IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1843

LEONARD CROW DOG,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SANFORD JAY ROSEN
ROSEN, REMCHO & HENDERSON
3504 Clay Street
San Francisco, California 94118

JOSEPH REMCHO
ROSEN, REMCHO & HENDERSON
155 Montgomery Street
San Francisco, California 94104

Attorneys for Petitioner

KENNETH TILSEN
400 Minnesota Building
St. Paul, Minnesota
Of Counsel

INDEX

TABLE OF AUTHORITIES

PAGE

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-.....

LEONARD CROW DOG,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Leonard Crow Dog, who was defendant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on March 31, 1976.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit, affirming the final judgment of conviction in the United States District Court for the Northern District of Iowa, is unreported. It is set forth in the Appendix, *infra,* at p. 1a.

The August 4, 1975 Order of the United States District Court for the Northern District of Iowa denying two pretrial motions to dismiss and denying post trial motions for

judgment of acquittal or new trial and for post trial relief is reported at 399 F. Supp. 228. It is also set forth in the Appendix, *infra,* at p. 42a.

The June 3, 1975 Order of the United States District Court for the Northern District of Iowa, denying the government's motion to amend that court's Order of May 30, 1975, concerning discovery and other pretrial order is unreported. It is set forth in the Appendix, *infra,* at p. 71a. The district court's Order of May 30, 1975 is also unreported. It is set forth in the Appendix, *infra,* at p. 77a.

The May 12, 1975 Order of the United States District Court for the District of South Dakota denying petitioner's motion to dismiss, granting in part and denying in part his motion to produce grand jury minutes, consolidating his trial with that of two other defendants, and severing a third count of his indictment, is unreported. It is reproduced in the Appendix, *infra,* at p. 86a.

The May 2, 1975 Order of the United States District Court for the District of South Dakota, denying in part and granting in part petitioner's motion concerning determination of venue and changing venue to the United States District Court for the Northern District of Iowa, is reported as *United States* v. *Holder,* 399 F. Supp. 220. It is also included in the Appendix, *infra,* at p. 93a.

The March 12, 1975 Order of Chief Judge Fred J. Nichol, of the United States District Court for the District of South Dakota, granting the government's motion to recuse, is unreported. It is set forth in the Appendix at p. 109a.

Other orders have been entered in the case, both by the Court of Appeals and the district courts, but are not included in the Appendix. With one exception, these were

each essentially minute Orders. A December 17, 1973 Memorandum Decision denying a defense motion to dismiss indictments arising out of the 1973 occupation-siege of the town of Wounded Knee, South Dakota, on grounds, *inter alia,* of unlawfully selective prosecution, is reported as *United States* v. *Banks,* 368 F. Supp. 1245. The petitioner's motion to dismiss the indictments then outstanding against him, but later superseded by the ones under which he was convicted, was in effect also denied by that Memorandum Decision. However, that decision does not appear in the Docket Sheets of the instant case that were a part of the Record transmitted to the Court of Appeals. That Memorandum Decision is not reproduced in the Appendix to this Petition.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1976 in accordance with the Opinion entered on that date. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by a minute Order dated April 22, 1976. By an Order of May 12, 1976, Justice Blackmun extended the time for filing the Petition for Writ of Certiorari to and including June 21, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

(1) Whether the defendant is entitled to a new trial due to newly discovered exculpatory evidence which had been suppressed by the government?

(2) Whether the defendant was entitled to an evidentiary hearing to determine the existence and materiality

of the newly discovered exculpatory evidence which had been suppressed by the government?

(3) Whether the defendant was entitled to a dismissal or a new trial because the government's intentional failure to perpetuate the grand jury testimony of law enforcement personnel who testified at trial violated the defendant's rights to confrontation and cross examination and equal access to evidence under the Fifth and Sixth Amendments to the United States Constitution, the Jencks Act and the Federal Rules of Criminal Procedure?

(4) Whether this Court should, under the exercise of its supervisory powers, order that all federal grand jury testimony be recorded so that it can be made available to the parties and courts in appropriate cases?

(5) Whether the defendant was entitled to a dismissal or a new trial because the government deliberately placed paid F.B.I. informants in the legal defense camp in violation of the defendant's rights to freedom of speech and association, privacy, effective assistance of counsel, due process of law, and freedom from unreasonable searches and seizures under the First, Fourth, Fifth, Sixth and Ninth Amendments to the United States Constitution?

(6) Whether this Court should, under its supervisory powers, grant the defendant dismissal or a new trial because of gross government misconduct, including the use of paid informers in the defense legal camp?

(7) Whether the defendant was entitled to discovery and disclosure of all material bearing upon the government's misconduct, including its use of paid informers in

the defense legal camp, and to the kind of proceedings on these issues contemplated by *Alderman* v. *United States*?

(8) Whether this Court should, under its supervisory powers, establish rules for the scrutiny and control of gross government misconduct, including the use of paid informers in the defense legal camp?

Constitutional Provisions, Statutes and Rules Involved

United States Constitution

Amendment I, Appendix, *infra* at p. 115a.

Amendment IV, Appendix, *infra,* at p. 115a.

Amendment V, Appendix, *infra,* at p. 115a.

Amendment VI, Appendix, *infra,* at pp. 115a-116a.

Amendment IX, Appendix, *infra,* at p. 116a.

United States Code, Title 18

§ 2, Appendix, *infra,* at p. 117a.

§ 111, Appendix, *infra,* at p. 117a.

§ 1114, Appendix, *infra,* at pp. 118a-19a.

§ 1153, Appendix, *infra,* at pp. 119-20a.

§ 2112, Appendix, *infra,* at p. 120a.

§ 3500, Appendix, *infra,* at pp. 121a-23a.

Federal Rules of Criminal Procedure

Rule 6(e) (with April 26, 1976 amendments), Appendix, *infra,* at p. 124a.

Statement of the Case

This Petition explores three basic areas for review. They involve government suppression of exculpatory evidence, selective recordation and transcription of grand jury testimony, and intrusion of government informants into the councils of the defense legal team. The record in the case is fairly complex, consisting of numerous pleadings, as well as a three volume transcript of motion proceedings and a four volume transcript of proceedings at trial and a simultaneous "taint" or suppression hearing.[1] In addition, the instant case is related to others arising out of the occupation-seige of Wounded Knee, South Dakota in 1973. Proper understanding of the Questions Presented and Reasons for Granting the Writ require some substantial elaboration of the record in this case and its relationship to other cases.

Petitioner Leonard Crow Dog [hereinafter defendant or Crow Dog] was convicted on June 5, 1975 of violating 18 U.S.C. §§111 and 1114 (interfering with and intimidating postal inspectors) and 18 U.S.C. §§1153 and 2112 (unlawfully taking a pistol from a postal inspector). Defendant was convicted under 18 U.S.C. §2 as an aider and abettor due to his presence at the scene of the incidents in question. (Each of the above statutes is set forth *infra,* at App. pp. 117a-120a.)

The pre-trial procedure

These charges arose out of an incident that took place on March 11, 1973, during the occupation-seige of Wounded

[1] References to the Motions Transcript will be indicated as Mot. Tr.; references to the Trial and "taint" hearing transcript will be indicated as Tr.; references to material in the Appendix to the Petition will be indicated as App.

Knee, South Dakota, and involved the alleged detention of four United States postal inspectors by members of the American Indian Movement (AIM). The charges were contained in an indictment that was handed down by a grand jury in the District of South Dakota on December 12, 1974. Carter Camp and Stanley Holder, co-defendants with Crow Dog at trial, were each charged with the identical offenses in separate indictments handed down on December 12, 1974.

The above indictments superceded indictments which had been returned in March and April of 1973 against these three men as well as four other men, who were alleged to have been prominently involved in the Wounded Knee incidents. The 1973 indictments charged each of the seven individuals with conspiracy in one count and with substantive offenses in ten other counts.

In June 1973, the seven defendants moved to consolidate their cases for trial. The Hon. Fred J. Nichol, Chief Judge of the United States District Court for the District of South Dakota, ordered a joint trial for two of these defendants, Dennis Banks and Russell Means, but denied consolidation to the others.

In October 1973, the seven defendants moved for a change of venue pursuant to Fed. R. Crim. P. 21(a). They satisfied Judge Nichol that prejudice against them existed in South Dakota, and venue was transferred to St. Paul, Minnesota.

The Banks and Means trial began in St. Paul before Judge Nichol in January 1974. One count of the indictment against them had been dismissed pre-trial, *United States* v. *Banks,* 368 F. Supp. 1245 (D.S.D. 1973); a judgment of acquittal as to five counts was ordered at the close of the government's case, *United States* v. *Banks,* 383 F. Supp.

368 (D.S.D. 1974); thereafter, on September 13, 1974, the remaining counts were dismissed due to a series of incidents of government misconduct, *United States* v. *Banks* 383 F. Supp. 389 (D.S.D. 1974), *app. dismissed,* 513 F.2d 1329 (8th Cir. 1975).

New indictments were issued against defendant Crow Dog, as well as Camp and Holder, on December 12, 1974, two months after the final dismissal of the Banks and Means prosecution. The new indictments were handed down by a grand jury sitting in the District of South Dakota, effectively returning prosecution of these defendants from St. Paul, Minnesota, back to South Dakota. On January 28, 1975, Crow Dog pleaded not guilty to all counts in the new indictment. The original 11-count indictments against Crow Dog, Camp and Holder, which had been transferred to St. Paul, were dismissed on February 5, 1975. Subsequently, Judge Nichol recused himself and reassigned the cases under the December 12, 1974 indictments to Chief Judge Edward McManus, of the United States District Court for the Northern District of Iowa, then sitting by designation in the District of South Dakota. (See App. at pp. 109a-114a.)

A pretrial conference was held on April 16, 1975. Numerous defense motions were filed seeking, *inter alia,* dismissal of the charges based upon denial of a speedy trial, bad faith prosecution, governmental misconduct and a claim that only hearsay testimony was presented before the grand jury returning the indictments. Defense motions also sought a determination of venue and transfer from the district; production of the transcripts of the grand jury testimony of those witnesses the government intended to call at trial; disclosure of each government informer or

operative having contact with any defendant or any member of the defense legal team; and disclosure of all exculpatory and impeaching evidence. In addition, the government filed a motion to consolidate the indictments against the three defendants for the purposes of trial.

On May 2, 1975, the district court transferred venue to the Northern District of Iowa, Cedar Rapids Division, because prejudice against Indians "created a reasonable likelihood of impairing defendants' right to a fair trial in the District of South Dakota." The court rejected, however, the defendants' argument that the superseding indictments were merely a continuation of the earlier indictments against the same defendants and that, pursuant to Judge Nichol's earlier transfer order, venue was still in St. Paul, Minnesota. *United States* v. *Holder,* 399 F. Supp. 220 (D.S.D. 1975). (App. at pp. 93a-108a.) The government's motion to consolidate was granted on May 12, 1975. In the same order, the defendants' motion to dismiss because of improper grand jury testimony was denied, but their motion to produce the grand jury minutes was granted in part and denied in part. (App. at pp. 86a-92a.)

The hearing on pre-trial motions

On May 27, 1975, a three-day evidentiary hearing commenced on the defendants' motions for dismissal on grounds of prosecutorial misconduct, discriminatory prosecution and denial of speedy trial. Some of the discovery motions were also considered and renewed at that hearing. After the hearing the motions to dismiss were taken under advisement, and were not passed upon until after the adverse jury verdicts.

One of the issues treated in the hearing on these motions concerned intrusion of government informers into the councils of the legal defense. On March 21 and 29, 1974, during

the trial of the *Banks-Means* case, Judge Nichol ordered the government to disclose all "information pertaining to FBI informants, including 'evidence arguably relevant to invasion of or contact with the defense attorney's camp.'" *United States* v. *Crow Dog*, 399 F. Supp. 228, 237. (App. at p. 53a.) As Judge McManus found in the instant case, the government placed a "strained construction" upon that order. *Ibid.*

Although we are reluctant to make the charge, it is clear that the same government attorneys who were responsible for prosecution both of the *Banks-Means* case and of the *Crow Dog* case, filed false and misleading affidavits with Judge Nichol, denying any such contact with or invasion of "the defense attorneys' camp" by F.B.I. informants or operatives. Judge McManus even went so far as to suggest that the prosecutors' false affidavits constituted "a possible contempt matter to be dealt with by Judge Nichol in that fashion if should he so desire." 399 F. Supp. at 337. (App. at p. 53a.) That the affidavits were false and misleading is further confirmed by the frequently remarkable and bizarre testimony at the hearing on the pretrial motions in the instant case by the prosecutors and the F.B.I. special agents with whom they were working. (*See* Mot. Tr. 56, line 19 to 82, line 18; Mot. Tr. 120, line 22 to 124, line 20; Mot. Tr. 146, line 7 to 149, line 11; Mot. Tr. 226, line 10 to 252, line 13; Mot. Tr. 287, line 18 to 307, line 18; Mot. Tr. 400, line 21 to 411, line 12; Tr. 436, line 20 to 446, line 16.)

After the final dismissal in the *Banks-Means* case, and before the start of the trial in the instant case, the defense learned that at least two government informants or operatives, Douglas Durham and John Schafer (a/k/a Harry or Gy Schaffer), had infiltrated the Wounded Knee Defense-

Offense Committee. The Committee was a highly integrated legal organization of Wounded Knee defendants, attorneys and legal assistants, who were and remained responsible for the legal representation of all seven of the original defendants (including Crow Dog) who were originally indicted in March and April of 1973. In fact, Kenneth Tilsen, Crow Dog's trial attorney in the instant case was also one of Russell Mean's attorneys in the trial before Judge Nichol.

The names of both Durham and Schafer appear on a list of defense team members, which was employed by the prosecutors when they conducted an extensive examination of informant files in an attempt to comply with Judge Nichol's March 21 and 29, 1974 orders. (Mot. Tr. 240, line 21 to 242, line 4.) Further, before submitting their false and misleading affidavits to Judge Nichol, these prosecutors had examined the files of Durham and Schafer. (Mot. Tr. 252, line 10 to 253, line 9.) The prosecution's explanation for executing the false affidavits was that they had examined the files "not to determine who the informants were but what type of information was being passed by the informants" (Mot. Tr. 233, lines 17-19), despite Judge Nichol's clear order "directing disclosure of information pertaining to FBI informants, including 'evidence arguably relevant to invasion of or contact with the defense attorney's camp,'" *United States* v. *Crow Dog*, 399 F. Supp. 228, 237 (N.D. Iowa 1975). (App. at p. 53a.)

Durham had come to St. Paul, Minnesota from another mid-Western City, where he had been working as an F.B.I. informant and operative, to continue such work "in a security capacity [ostensibly for the defendants] at the [*Banks-Means*] trial." (Mot. Tr. 126, line 22 to 132, line 4.) For

this work, he was paid by the F.B.I. approximately $1,000 to $1,100 per month. (Mot. Tr. 131, line 23 to 132, line 4.)

During the course of the *Banks-Means* trial, Durham had 15 to 20 contacts with special agent Raymond Williams, 20 to 25 contacts with special agent Robert Taubert and 2 to 3 contacts with special agent Douglas Hoferer, each of whom was assigned to the Minneapolis Office of the F.B.I. (Mot. Tr. 133, line 16 to 134, line 12.) There is no question that Durham was present at conferences between the defendants and their lawyers. (*E.g.*, Mot. Tr. 123, lines 4-9; Mot. Tr. 152, lines 6-8; Mot. Tr. 265, lines 2-5.) Further, Williams admitted that he "very likely discussed" the case during the trial with special agent Ray Gammon, who was in the courtroom throughout the *Banks-Means* trial. And Williams was unable to testify that he did not discuss his operatives with Gammon during that trial. (Mot. Tr. 145, line 2 to 146, line 6.)

At the hearing on the defendants' motions to dismiss in the instant case, Williams was the only F.B.I. special agent to testify who had been in direct contact with Durham. The cross-examination of Williams, however, was severely limited because of a departmental rule forbidding F.B.I. agents from answering certain types of questions without permission from their superiors. (Mot. Tr. 134, line 22 to 137, line 17; Mot. Tr. 179, lines 9-13.) Further, although the court received and reviewed Durham's F.B.I. file (and that of Schafer, as well as other documents *in camera, e.g.*, Mot. Trans. 138, line 5 to 139, line 9), defendants' counsel was denied any opportunity to examine the *in camera* exhibits. The defendants repeatedly complained that effective cross-examination, both of Williams and the prosecutors, was being denied because the *in camera* exhibits

remained undisclosed. These complaints and their renewed motion for leave to examine the *in camera* exhibits initially were taken under advisement. (*E.g.*, Mot. Tr. 135, line 8 to 137, line 17; Mot. Tr. 180, line 18 to 181, line 7; Mot. Tr. 253, lines 10-15; Mot. Tr. 348, line 17 to 349, line 4; Mot. Tr. 446, line 17 to 447, line 19; Mot. Tr. 453, line 3 to 455, line 21.) However, the motions were denied in a written order of May 30, 1974. (App. at pp. 77a-85a.)

Thus no cross-examination was conducted concerning any fact in Durham's file, which was six inches thick (Mot. Tr. 160, lines 6-15), or in the other *in camera* files and exhibits. Obviously, defendants' counsel was unable to prove or test anything concerning the nature of the material and information passed by Durham or other informants to the F.B.I. and the prosecution, or to determine the bearing that this material and information might have had on Crow Dog's prosecution.

The district court's written order of May 30, 1975 disposed of the defendants' outstanding discovery motions. The court denied a request that it examine *in camera* all government files relating to the cases for exculpatory evidence; and denied the defense motions to examine the names and files of informants and other *in camera* exhibits. It did order the government to provide the defendants prior to trial with any information concerning misconduct of government witnesses and bearing on their credibility. It also ordered the government to produce for the court's *in camera* inspection the names and files of all informants "who arguably have had contact with the legal team of the defendants," and to produce affidavits by the prosecutors addressing the relation of any informants to the proceedings. (App. at pp. 77a-85a.)

Three affidavits, by the same prosecutors who had grossly misconstrued Judge Nichol's disclosure orders of March 21 and 29, 1974, were filed on June 2 and 16, 1975. The prosecutors admitted

> That during the period of January 1, 1973, to May 31, 1975, *the total number of government informants utilized during the Wounded Knee affair,* and in connection with all prosecutions arising therefrom, *was 313.*

They also declared,

> That no information secured by any of these informants concerning defense strategy relating to the present cases or previous cases involving the same defendants has been passed on to the investigative agency or the prosecutors.

(Affidavit of William F. Clayton, R.D. Hurd, and David R. Gienapp, filed June 16, 1975) (Emphasis added).

The trial

The trial began on June 2, 1975 with the jury selection which consumed one day. The prosecution began presenting its case on June 3, 1975, and concluded the next day on June 4, 1975. The only testimony it offered was by three of the four postal inspectors involved in the March 11, 1973 incident, Gene Graham, Donald Schneider and Jack Hanson.

Before each of the prosecution witnesses testified, he was subjected to examination at eye-witness identification "taint" or suppression hearings outside of the jury's presence. (Tr. 236, lines 8-13; Tr. 237, line 1 to 284, line 16 (Graham); Tr. 394, line 24 to 401, line 12 (Hanson); Tr. 408, line 19 to 443, line 7 (Schneider).) Motions to suppress eye-witness identification of the defendant Crow Dog by

Graham and Schneider were made on the grounds, *inter alia,* that the identification by these prosecution witnesses was tainted by improper photo-layout and other improper pretrial identification procedures. (*E.g.,* Tr. 234, line 10 to 236, line 13; Tr. 285, line 21 to 287, line 3 (Graham); Tr. 443, line 21 to 450, line 18 (Schneider).) These motions were denied. (*E.g.,* Tr. 287, lines 11-14 (Graham); Tr. 450, lines 19-24 (Schneider). However, after Hanson's interrogation at the suppression hearing, the prosecution announced that he would not identify any of the defendants at the trial. (Tr. 402, lines 14-16; Tr. 406; lines 3-16.)

It was not contested at trial that, on March 11, 1973, four postal inspectors were taken prisoner or "interfered" with outside of Wounded Knee, transported into town and held captive for several hours at a museum, before being released unharmed. Nor was it contested that government property was taken from them. At issue was the alleged role of the defendants. With respect to Crow Dog's participation, the testimony of the prosecution's three witnesses is contradictory and otherwise faulted.

The evidence against Crow Dog

Inspector Hanson did not identify any of the defendants. However, he testified, consistently with an eleven-page report he sent on April 16, 1973, to the United States Attorney, that a person (whom the prosecution agreed was unquestionably Crow Dog (Tr. 494, line 23)), "entered the museum, gave us his dialogue and left without having taken an active part in the kidnapping, robbery or release" (Tr. 495, lines 14-17; Tr. 499, lines 13-18). According to Hanson, this person spoke about concerns to the Indian people, and the general theme of the talk was the Wounded Knee massacre of 1890. (Tr. 491, line 21 to 492, line 10.)

Inspector Graham testified that after entering the museum at Wounded Knee, he surrendered the keys to his briefcase to a man he identified as Crow Dog. (Tr. 305, line 5 to 309, line 12.) He also testified that Crow Dog lectured to the postal inspectors for five or ten minutes and "commented that we should be searched in groin area for radios." No such search took place. (Tr. 310, lines 1-22; Tr. 352, lines 3 to 10.)

After the March 11, 1973, incidents, Graham learned that Leonard Crow Dog was the spiritual leader of the American Indian Movement (Tr. 347, line 2 to 348, line 6), and "came to identify him with the individual that lectured us in the museum" (Tr. 348, lines 4-6). However, he could not explain how he made this identification. (Tr. 348, lines 1-14). In fact, he admitted that he was mistaken in his belief that he saw Crow Dog's picture in a newspaper, in connection with a story in April or May, 1973, about a trip some of the Indians were taking to Washington, D.C. (Tr. 350, line 16 to 351, line 15; Tr. 277, line 17 to 279, line 13 (taint hearing)).

It never was disclosed how Graham came to identify Crow Dog. He did, however, have ample opportunity, in consultation with F.B.I. agents and government prosecutors, to do so. And, at the taint hearing, he admitted that it was possible he may have been shown and not recognized a photograph of Crow Dog immediately after the incident. (Tr. 283, lines 13-15 (taint hearing).) Graham testified twice before grand juries concerning the incident, once shortly after his release in March, 1973, and once in December, 1974. (Tr. 332, lines 19-24; Tr. 349, lines 1-5.) He also testified about these events at the *Banks-Means*

trial (Tr. 334, line 6 to 335, line 5), and once in Lincoln, Nebraska (Tr. 335, lines 14-19). He spent considerable time in the prosecutors' offices during these occasions. (Tr. 333, line 13 to 336, line 2.) He was interviewed seven or eight times by the F.B.I. concerning the incident and filed at least four separate reports of the incident with his superiors. (Tr. 336, line 7 to 337, line 17.) But before the trial, he never mentioned that Crow Dog had "commented that we should be searched in the groin area for radios." (Tr. 351, line 22 to 353, line 18.)

Further, Graham was familiar with the eleven-page letter sent by Hanson on April 16, 1973, to the United States Attorney (Tr. 337, line 17 to 338, line 2), and with its statement that Crow Dog "did not take any active part in the kidnapping, robbery or release." (Tr. 339, line 13 to 340, line 19.) Yet, he never took issue with Hanson's testimony about "Mr. Crow Dog's non-participation in the event other than what you call lecturing." (Tr. 340, lines 9-13; Tr. 356, lines 3-9.)

In an interview with an F.B.I. agent, resulting in that agent's report of August 3, 1973 (Tr. 341, lines 2-7), Graham stated that there was one item that he apparently failed to mention in his previous statement. (Tr. 354, line 19 to 356, line 1.) According to the F.B.I. agent's report,

> As he was entering the museum someone behind him asked for the car keys. Graham said he then turned around and handed the keys to a person whose identity he later determined to be Leonard Crow Dog. (Tr. 341, lines 16-19.)

At trial, Graham's testimony conflicted with his prior statements, and was internally contradictory as well. He testified that the event with the car keys never took place

(Tr. 342, lines 5-23), that the key to his briefcase and not his car keys was involved (Tr. 341, line 23 to 342, line 19), that his contact with Crow Dog occurred about one half an hour after he, Graham, had entered the museum (Tr. 343, lines 3-19), that he did not see the defendant before he got into the museum (Tr. 388, lines 2-5), and that when he first saw the defendant he had already been loosely tied (Tr. 386, lines 6-8). He also testified that he saw Crow Dog either in the museum or during the course of his release (Tr. 385, lines 7-11), that Crow Dog asked Graham for his keys after Crow Dog had delivered his speech (Tr. 381, line 17 to 382, line 15), that Crow Dog then went outside and, Graham "believes," then came back inside (Tr. 379, lines 19-24), that he saw Crow Dog at least twice on March 11, 1973 (Tr. 379, line 25 to 380, line 8), and finally that he saw Crow Dog only once (Tr. 384, lines 5-18; Tr. 389, lines 1-11).

Inspector Schneider also identified Crow Dog. He testified that "there was a time when either Mr. Crow Dog, or a man by the name of Dan Holder, came in and asked for the keys to Inspector Graham's car, and also Nelson's briefcase." (Tr. 511, lines 18-21.) He also contended that he first saw Crow Dog in front of the museum and heard him say they were prisoners of war (Tr. 512, lines 11-13), that Crow Dog entered the museum with them and repeated his statement about them being prisoners of war (Tr. 512, line 22 to 513, line 1), and that Crow Dog suggested that a very thorough search, including a search of their crotches, be conducted for hidden microphones (Tr. 513, lines 1-7). Schneider also testified that Crow Dog gave him his coat and watch when he asked for it. (*See* Tr. 518, lines 11-17.)

According to Schneider, "we were then cautioned by an Indian that lectured to us on the evil ways of the white man." (Tr. 531, lines 3-9.) This lecture lasted about 45 minutes. (Tr. 539, line 11.) He stated that Crow Dog was not the lecturer. (Tr. 539, lines 11-22, Tr. 350, lines 7-21.)

According to Schneider, he first identified Crow Dog in the F.B.I. office in Minneapolis on April 17, 1975, when the prosecutors, F.B.I. agents and postal inspector-witnesses met after the pre-trial conference to prepare for trial. (Tr. 541, line 7 to 545, line 14.) This identification took place nearly twenty-six months after the events in question.

After the testimony of their three witnesses, the prosecution rested. (Tr. 565, line 22.) The defendants renewed motions to strike certain testimony, on grounds, *inter alia*, of surprise and tainted identification evidence. (*E.g.*, Tr. 571, lines 11-25.) They also moved for a judgment of acquittal based upon the insufficiency of the evidence against them (Tr. 576, lines 9-12.) All such motions were denied. (Tr. 593, lines 2-10.)

The conviction

The defendants rested without presenting any testimony (Tr. 599, lines 6-9), and immediately renewed their motion for judgment of acquittal. (Tr. 599, line 23 to 600, line 9.) That motion was again denied by the court. (Tr. 600, lines 10-11.) On June 5, 1975, after deliberating for three hours, the jury returned guilty verdicts as to all charges against Crow Dog and his co-defendants. (Tr. 696, line 2 to 699, line 7.)

Post-trial proceedings

On June 27, 1975, the defendants filed a post-trial motion for acquittal or new trial based primarily upon insufficiency of the evidence, the government's failure to disclose evidence and problems with the in-court identification of the

defendants. A second post-trial motion was filed on July 25, 1975, seeking to supplement the record and to secure an evidentiary hearing with respect to newly discovered evidence. The defendants contended that the newly discovered evidence was an identifiable group of photographs which apparently had been used in the process of identifying the defendants and had been suppressed by the government. This group of photographs probably included photographs of the defendants, and was also likely to have been shown to the prosecution witnesses when they were questioned by the F.B.I. immediately after they were released on March 11, 1973. (*See* Motion for Post-Trial Relief, and supporting affidavits and exhibits; Supplemental Affidavit and Reply to Government's Response to Motion for Post-Trial Relief.) Yet, each of the prosecution witnesses to present in-court identifications stated that to the best of his recollection he did not see any photograph of any of the defendants when he was interrogated by the F.B.I. on March 11, 1973. (Tr. 239, lines 3-24; Tr. 283, lines 1-21; Tr. 437, lines 3-16.)

On August 4, 1975, the court denied all outstanding defense motions for dismissal, judgment of acquittal, new trial and evidentiary hearing. *United States* v. *Crow Dog,* 399 F. Supp. 288 (N.D. Iowa 1975). (App. at pp. 42a-70a.) On August 5, 1975, Crow Dog was sentenced to three years on Count I (interference with postal inspectors) and eight years on Count II (robbery of government property), the sentences to run concurrently. Execution of the sentences was suspended and Crow Dog was placed on probation for five years. On February 4, 1976, probation was revoked because he was convicted of subsequent offenses. An appeal is now pending in the United States Court of Appeals for the Eighth Circuit from a subsequent conviction in which he was ordered to serve a prison term. (8th Cir. No. 75-1934.)

The Court of Appeals decision

In the instant case, the Court of Appeals affirmed the judgment of conviction against Crow Dog. It held, *inter alia,* that he had not demonstrated that he was entitled to a further hearing or a new trial because the government had suppressed exculpatory evidence, he had not demonstrated that his rights to a speedy indictment and trial had been violated, and he had not demonstrated that there was insufficient evidence to sustain the conviction. Further, inasmuch as he had not demonstrated that he had in fact been prejudiced by discriminatory and bad faith prosecution and government misconduct, including invasion of the defense legal team by government informants, he was not entitled to dismissal on those grounds. He was also not entitled to reversal or dismissal because of the government's systematic failure to record and transcribe the grand jury testimony of law enforcement personnel. (App. at pp. 1a-40a.) On this last point, Judge Lay concurred separately, sharply criticizing the government's practice and cautioning the district courts within the Eighth Circuit to promulgate local rules requiring the recording of such grand jury testimony. (App. at pp. 40a-41a.)

Reasons for Granting the Writ

This case brings before the Court certain police and prosecutorial practices of the federal government that are at best shoddy. In fact, they are a serious danger to our liberties. The argument for review is all the more compelling because of the context of this case. These practices occurred in the course of a criminal prosecution arising out of a highly publicized political event, the Wounded Knee occupation-seige. The first federal prosecution of any of

the Indian leaders involved in that event, the *Banks-Means* case, ended, after a nine month jury trial, with court-ordered dismissals for gross and flagrant misconduct by the same government lawyers who prosecuted the instant case. The petitioner, Leonard Crow Dog, had been rebuffed by the government in his timely efforts to secure an early trial of the charges against him by consolidating his trial with that of Banks and Means. Crow Dog is an acknowledged Indian Medicine Man and spiritual leader of numerous Indian Tribes, who traces his ancestry to a successful applicant for review by this Court, *Ex Parte Crow Dog,* 109 U.S. 556 (1883). The evidence of Crow Dog's guilt of the offenses charged as an aider and abettor was barely adequate to sustain the conviction and might well not have survived further scrutiny, had the government not rendered it impossible for a proper and exhaustive testing of the evidence against him to occur.

Before the trial court and in the Court of Appeals, defendant raised numerous challenges to his prosecution and conviction. They are surveyed at some length in the opinions contained in the Appendix to this Petition. It is appropriate to examine those opinions to appreciate the full range of defects that were challenged by defendant. They suggest something of the total circumstances of the case, in which the array of government forces brought to bear ultimately upon this defendant reflects poorly upon our system of criminal justice and raises more questions than it answers.

In this Petition only three of the government's practices in the case are addressed. For they are the ones, under the technical rules for review by this Court, that are most available to us. But they raise many of the serious questions. They involve the government's willful or negligent failure to disclose exculpatory evidence, the government's purposeful and systematic practice of failing to preserve material evidence, and the government's flagrant use of paid informers who infiltrate and compromise the councils of a criminal defendant's legal team.

I.

The decision below is inconsistent with controlling decisions of this Court requiring the government to disclose to criminal defendants all material exculpatory evidence.

The Court of Appeals acknowledged that "[a] more difficult question is presented with regard to appellant's allegation that the government failed to disclose exculpatory evidence to the defense in violation of the dictates of *Brady* v. *Maryland,*" 373 U.S. 83 (1963). (App. at p. 14a.) Nevertheless, that court concluded that the defendant is entitled to neither an evidentiary bearing on this issue nor to a new trial. (App. at pp. 14a-22a.)

Immediately after the incident giving rise to the indictments, each prosecution witness to make in-court identifications spent several hours in the F.B.I. office in the Bureau of Indian Affairs building in Pine Ridge, South Dakota examining a stack of photographs. (Tr. 268, lines 8-25 (Graham); Tr. 283, lines 1-21 (Graham); Tr. 437, lines 3-16 (Schneider); see Tr. 488, lines 17-24 (Schneider).) These witnesses do not recall seeing any photographs of Crow Dog, and made no identification of the defendant at that time. (Tr. 239, lines 3-24 (Graham); Tr. 283, lines 1-21

(Graham); Tr. 437, lines 3-16 (Schneider).) Before, during and after the trial, defendant made motions for discovery of these photographs. (April 16, 1975, Motion to Compel Attorneys for the Government to Disclose Evidence Favorable to the Defendants; Tr. 270, lines 1-19; July 25, 1975, Motion for Post-Trial Relief, and attachments; August 5, 1975, Supplemental Affidavit and Reply to Government's Response to Defendants' Motion for Post-Trial Relief.) They have never been provided to defendant nor to the courts below.

During the trial the prosecutor stated that the government had supplied defense counsel with "all [the] photographs that we have. . . . " (Tr. 270, lines 15-16.) After trial, in connection with a different case, however, defendant's attorney discovered the existence of an identifiable group of photographs which probably contained pictures of the defendant and which were likely to have been shown to the government's witnesses in the instant case during their interrogation by F.B.I. agents on March 11, 1973. The government does not deny the existence of this group of photographs, or that it may contain pictures of the defendant and may have been shown to the government witnesses on March 11, 1973. (See July 29, 1975, Response to Defendants' Motion for Post-Trial Relief; Memorandum for the United States in Opposition to Defendant's Motion for Stay, at pp. 4-5, U.S.S.C. October 1975 Term No. A-1009.) Rather, in its unsworn statements, the government appears to admit that the photographs in question were shown to Judge Nichol in the *Banks-Means* case, and were found by him to be not relevant to that case. Further, the government's statements suggest that the photographs in question were "probably" "mug shots" of persons who had

been arrested during incidents in Custer and Rapid City, South Dakota, and since Crow Dog was not arrested on either of those occasions there would be no photograph of him among that group.

No hearing, procedure or even *ex parte* disclosure to the courts below, and *in camera* examination by them, of the relevant government records and photographs has been conducted to determine whether the group of photographs in question exists, or was shown to the government's witnesses on March 11, 1973, or whether Crow Dog's picture is included in the group. Despite the paucity of dispositive evidence on the issue, in reviewing the record the Court of Appeals concluded that "the existence and content of the photographs . . . are open to serious doubt." (App. at p. 14a.) The Court of Appeals also concluded "that it is entirely plausible, if not probable, that the photographs shown to the inspectors [on March 11, 1973] were mug shots of persons arrested in those two earlier incidents and did not include appellant Crow Dog." (App. at p. 17a.)

Especially considering the prior history, in the instant and related cases, of dissembling, misstatement and misconduct generally by the very prosecutors who are assuring the courts in unsworn statements of the "facts" concerning the photographs in question, we submit that a determination of these facts cannot be made on the record in the instant case. Perhaps because it shared our discontent with the state of the record, and the prosecution's demonstrated lack of regard for veracity and due process of law, the Court of Appeals "assum[ed], arguendo, that [Crow Dog's] contentions with regard to the photographs would be sufficient under ordinary circumstances to require a hear-

ing. . . . " (App. at p. 17a.) The court nevertheless affirmed the convictions without requiring such a hearing. In its view, "a remand for a hearing in this case would serve no useful purpose . . . [because] the evidentiary use of the photographs could not have constituted the type of exculpatory evidence which would have required the granting of a new trial under *Brady* standards." *Ibid.* The Court of Appeals' understanding and application of these standards, in the total context of this case, raises serious questions that should be resolved by this Court.

The Court of Appeals applied the three-pronged standard articulated in *Moore* v. *Illinois,* 408 U.S. 786 (1972), "for use in testing a claimed violation of due process on these [*Brady*] grounds." (App. at p. 17a.) Assuming the existence of the photographs, the court found, in terms of *Moore* v. *Illinois, supra,* 408 U.S. at 794-95, that Crow Dog had demonstrated "(a) suppression by the prosecution after a request by the defense, [and] (b) the evidence's favorable character for the defense . . . " (App. at pp. 17a-18a.)

The court concluded, however, that Crow Dog failed to demonstrate that the photographs met the third *Moore* v. *Illinois,* 408 U.S. at 795, standard, which concerns "the materiality of the evidence" (See App. at pp. 18a-22a). As it misunderstood that third standard, the court ruled that: "the nature of the suppressed evidence is such that it could not have been used by skilled counsel to develop 'a reasonable doubt of guilt in the minds of enough jurors to avoid a conviction.' " (App. at p. 19a) (citations omitted).

First the court decided that even if the suppressed evidence demonstrated that the prosecution's eye-witness had

failed to identify Crow Dog at a photo-display conducted immediately after their release, the trial court "would [not] have found that the in-court identifications were so tainted as to preclude their reliability." (App. at p. 19a.) The basis for this remarkable supposition is that "the record of the thorough taint hearing conducted by the trial court as to each inspector adequately rebuts this charge and supports the district court's conclusion that an independent basis for identification existed in each instance." (App. at pp. 19a-20a.)

But the record of the testimony both at the taint hearings and before the jury demonstrate that the suppressed evidence might well have caused a different result at the taint hearing. And if the two in-court identifications had been suppressed, the government could hardly have gone forward with the prosecution.

The record of the already precarious basis for the two eye-witness identifications of Crow Dog is summarized in the Statement of the Case, *supra,* at pp. 15-19. One witness, Graham, never explained how he came to identify the defendant. In fact, he had to admit numerous mistakes in his testimony concerning how he came to make the identification. The other witness, Schneider, failed to identify the defendant, despite ample opportunity to do so, until the eve of trial some twenty-six months after the events in question. Each of these witnesses disagreed with one another as to important facts concerning the defendant's alleged participation in the events in question. Each of these witnesses in turn disagreed with a third witness, Hanson, who was present at those events, but who made no in-court identification. However, shortly after the events in question, Hanson had filed a comprehensive report stating that Crow Dog took no active part in the interference or theft, other than his lecturing of the postal inspectors.

Surely on this state of the record, the instant case differs significantly from *Neil* v. *Biggers,* 409 U.S. 188, 201 (1972), where the Court sustained an eye-witness identification only because it found ample reason for its reliability:

> There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification.

The record in the instant case is more like the situation that pertained in *United States* v. *Gambrill,* 449 F. 2d 1148 (D.C. Cir. 1971), where the court reversed a conviction in which the victim, who made an in-court identification of two defendants, had been unable to identify one of them at a lineup six days after the crime. *See United States* v. *Wade,* 388 U.S. 218, 241 (1967), where the Court ruled that, in determining whether an identification was unlawfully tainted, several factors must be considered, including: "failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification."

The Court of Appeals also held, in the instant case, that "the suppressed identification evidence could not have had such a major bearing on the credibility of the postal inspectors as to require a new trial under *Brady* standards." (App. at p. 20a.) The basis for this decision was that,

according to the court, it was virtually conceded that Crow Dog was present at some time during the postal inspectors' captivity inside the Wounded Knee museum, and that he lectured them. (App. at pp. 20a-21a.) Therefore, at trial the defendant "would have used the suppressed evidence [only] for the purpose of impeaching the postal inspectors with respect to their subsequent identification of Leonard Crow Dog as a man who did certain acts in addition to lecturing while inside the museum." (App. at p. 21a.)

The court recognized that "there were contradictions and inconsistencies in their testimony on the issue of Crow Dog's role in the incident." (App. at p. 21a.)[2] The court observed that able defense attorneys explored these inconsistencies at length in cross-examination and that, in the court's view, "[i]n many respects, the claimed suppressed identification evidence would have been cumulative." Hence, the court held that "the evidence could not have played a determinative role in the outcome of the trial." (App. at p. 21a.) Certainly this ruling is at least apparently inconsistent with this Court's holding in *Napue* v. *Illinois,* 360 U.S. 264, 270 (1959), "that the fact the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner . . ." did not render harmless the prosecution's knowing use of tainted testimony.

As the Court of Appeals observed,

> Evidence was presented in this case which showed that appellant Crow Dog (1) met the postal inspectors

[2] The contradictions included a direct conflict between Graham and Schneider as to whether it was Crow Dog who had lectured the postal inspectors.

> outside the museum building in which they were subsequently held and informed them that they were "prisoners of war" and would be treated accordingly; (2) entered the building with the inspectors and repeated the prisoner of war statement to them as they were being bound and gagged; (3) lectured the captive inspectors on the problems of Indian people in the areas of health and education; (4) warned that the inspectors might be carrying concealed recording or recording or radio transmitting equipment on their bodies and that they should be searched; and, (5) took keys to a locked briefcase from one of the inspectors. (App. at p. 30a.)

As to each of these points, the testimony among the three prosecution witnesses was in sharp conflict. In fact, the testimony of each of the two eye-witnesses, Graham and Schneider, who made in-court identifications of Crow Dog was internally inconsistent. The only issue as to which there was no conflict within the prosecution's evidence involved Crow Dog's mere presence at some point while the postal inspectors were held captive in the museum.

However, mere presence at the site of a crime is not sufficient to establish guilt either of a substantive offense or of aiding and abetting. *E.g., United States* v. *Williams,* 341 U.S. 58, 64 n. 4 (1951); *United States* v. *Hill,* 464 F. 2d 1287, 1289 (8th Cir. 1972); *Bailey* v. *United States,* 416 F. 2d 1110, 1113 (D.C. Cir. 1969). *See Nye & Nissen* v. *United States,* 336 U.S. 613, 619 (1949). To be guilty of aiding and abetting, the accused must have assisted or encouraged the commission of the crime and he or she must have had a specific intent or purposive attitude to promote or facilitate the crime. *See, e.g., United States* v. *Baumgarten,* 517 F. 2d 1020 (8th Cir.), *cert. denied,* 423 U.S. 878 (1975); *United States* v. *Kelton,* 446 F. 2d 669 (8th Cir. 1971).

Thus, the government's evidence concerning Crow Dog's alleged conduct while present in the museum was essential to the conviction. And the credibility of Graham and Schneider was central to the government's case. Assuming their credibility could have been impeached with the suppressed photographic evidence, Crow Dog clearly would be entitled to a new trial. *Giglio* v. *United States,* 405 U.S. 150 (1972); *Napue* v. *Illinois,* 360 U.S. 264 (1959). At the very least, Crow Dog is entitled to an evidentiary hearing to determine the facts concerning the photographs in question so that a proper determination of materiality and prejudice can be made. *See, e.g., Alderman* v. *United States,* 394 U.S. 165 (1969).

A writ of certiorari should issue in this case so that the Court can rearticulate its standards, disregarded by the court below as well as other circuit courts (*see, e.g.,* App. at p. 19a), for determining whether suppressed exculpatory evidence exists and whether it is material. *Cf. Goldberg* v. *United States,* —— U.S. ——, 47 L. Ed. 2d 603, 618 n. 21 (1976).

II.

The decision below raises important questions with respect to the widely criticized government practice of selectively recording and transcribing grand jury testimony that have not been but should be decided by this Court.

The government has also rendered it impossible for the defendant or even the courts to secure additional evidence that may be both exculpatory and material. One of the prosecution witnesses, Graham, testified that when he went to Wounded Knee on March 11, 1973, he knew he would be testifying before a grand jury in the next day or two, and he in fact testified before that grand jury. (Tr. 332, lines 19-24.) No transcript of that testimony exists, for, as the prosecutor conceded: "As is the policy in our office, law enforcement testimony before the Grand Jury is not transcribed." (Tr. 333, lines 5-7.) When he testified before the grand jury in March of 1973, Graham testified "as to what happened to us on March 11th." (Tr. 348, line 25.) He also testified about those events before a grand jury, presumably the one to hand down the instant indictments, in December of 1974. No transcript was kept of that testimony either. (Tr. 349, lines 1 to 350, line 5.)

Had the transcripts of Graham's testimony before the grand jury existed, the defendant would have been entitled to discover them. Using them, the defendant might well have so undercut Graham's eye-witness identification as to cause its suppression or to vitiate its credibility. *See Goldberg* v. *United States,* —— U.S. ——, 47 L.Ed. 2d 603, 618 n. 21 (1976), where the court ruled that "[s]ince the

courts cannot 'speculate whether [Jencks material] could have been utilized effectively' at trial, the harmless-error doctrine must be strictly applied in Jencks Act cases." (Citation omitted.)

Before the courts below, defendant contended that "the intentional failure by the government to have grand jury testimony of law enforcement personnel recorded constituted [prejudicial] error." (App. at p. 39a.) Following a long line of its own decisions, the Court of Appeals rejected this contention, holding that "there is no constitutional or statutory requirement that grand jury testimony be recorded." (App. at p. 39a.) Judge Lay, concurring separately, agreed with the majority but cautioned the district courts within the Eighth Circuit that:

> . . . the time has come for district courts to adopt local rules requiring the government to record grand jury testimony of law enforcement personnel. (App. at p. 40a.)

Judge Lay joined the almost universal chorus of circuit courts and judges who have acquiesced in the government's intentional practice of selective recordation, while condemning it and warning of its ultimate demise. *But see, United States* v. *Cramer,* 447 F.2d 210, 220-23 (2d Cir. 1971), *cert. denied,* 404 U.S. 1024 (1972), where Judge Oakes, dissenting, would have held the government's failure to record to be a violation of F.R.Cr.P. 6(d), "if not the due process clause of the Fifth Amendment." *But cf., United States* v. *Battisti,* 486 F.2d 961 (6th Cir. 1973), where the Sixth Circuit refused to issue a writ of mandamus directing a district judge not to require the government to record all grand jury testimony.

Among the circuit courts to state or strongly imply such criticism are:

> The First Circuit: *Schlinsky* v. *United States*, 379 F.2d 735 (1st Cir.), *cert. denied*, 394 U.S. 920 (1967); *see United States* v. *Gramolini*, 301 F. Supp. 39 (D.R.I. 1969), where the court imposed a recordation rule prospectively.
>
> The Second Circuit: *United States* v. *Peden*, 472 F.2d 583, 584 (2d Cir. 1973); *United States* v. *Cramer*, 447 F.2d 210, 214 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).
>
> The Third Circuit: *United States* v. *Crutchley*, 502 F.2d 1195, 1200 (3rd Cir. 1974); *United States* v. *Lardieri*, 497 F.2d 317, 318 n.2 (3rd Cir. 1974).
>
> The Sixth Circuit: *United States* v. *Battisti*, 486 F.2d 961 (6th Cir. 1973); *United States* v. *Hensley*, 374 F.2d 341, 352 (6th Cir.), *cert. denied*, 388 U.S. 923 (1967).
>
> The Seventh Circuit: *United States* v. *McCord*, 509 F.2d 891 (7th Cir.), *cert. denied*, —— U.S. ——, 46 L.Ed.2d 51 (1975); *United States* v. *Aloisio*, 440 F.2d 705, 708 n.2 (7th Cir.), *cert. denied*, 404 U.S. 824 (1971), commending the United States District Court for the Northern District of Illinois for adopting an appropriate mandatory recordation rule.
>
> The Eighth Circuit: *United States* v. *John*, 508 F.2d 1134, 1142 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975); *United States* v. *Arradondo*, 483 F.2d 980, 984 n.4 (8th Cir. 1973), *cert. denied*, 415 U.S. 924 (1974).
>
> The Ninth Circuit: *United States* v. *King*, 478 F.2d 494, 508 (9th Cir.), *cert. denied sub. nom. Light, et al.* v. *United States*, 414 U.S. 846 (1973) warning that "the Government is courting disaster when it fails to record grand jury proceedings"; *United States* v. *Thoreson*, 428 F.2d 654, 666 (9th Cir. 1970); *id.*, 428 F.2d at 668-69 (Ely, J. concurring).[3]

In its most recent discussion of grand juries, this Court declared that:

> The grand jury is an integral part of our constitutional heritage . . . . Its historic office has been to provide a shield against arbitrary and oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance. (*United States* v. *Mandujano*, —— U.S. ——, 44 U.S.L. Week 4629, 4632 (May 19, 1976).)

It is at least arguable, that given the awesome powers and responsibilities of grand juries, systematic and purposeful failure by the government to record and transcribe grand jury testimony of law enforcement personnel violates the due process clause of the Fifth Amendment as well as an accused's rights to confrontation and effective cross-examination under the Sixth Amendment. Further, this government practice is a flagrantly unlawful strategem to circumvent the Jencks Act, which requires disclosure to the accused of "a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to

---

[3] The commentators, too, have consistently proposed that all grand jury testimony be recorded. *See*, Report of the ABA Special Committee on Fed. Rules of Procedure 94-95 (Feb. 1971); Report of the ABA Special Committee on Fed. Rules of Procedure 106-07 (Aug. 1965); 1 Wright, *Federal Practice and Procedure, Criminal* §103 at 161 (1969); 8 *Moore's Federal Practice—Criminal Rules* ¶6.02(2) at 6-17 (1975).

a grand jury." 18 U.S.C. 3500 (e)(3). Finally, it appears to contravene F.R.Cr.P. 6(d) which obviously contemplates recordation of grand jury testimony, *see United States* v. *Cramer,* 447 F.2d 210, 220-23 (2d Cir. 1971) (Oakes, J. dissenting), *cert. denied,* 404 U.S. 1024 (1972), and renders it virtually impossible for an accused effectively to exercise the right, recognized in F.R.Cr.P. 6(e), to seek a dismissal for misconduct before the grand jury.[4]

In the leading decision on the right of an accused to secure the grand jury testimony of witnesses against him or her, this Court squarely ruled that the accused is entitled to equal access to such testimony: "In our adversary system for determining guilt or innocence it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *Dennis* v. *United States,* 384 U.S. 855, 873 (1966). *Cf. Washington* v. *Texas,* 388 U.S. 14 (1967). The Court should grant a writ of certiorari to determine whether the government's selective failure to record and transcribe grand jury testimony thus violates an accused's rights under the Constitution, the Jencks Act or the Federal Rules of Criminal Procedure, or otherwise calls for an exercise of this Court's supervisory powers over the federal courts and criminal justice system. *Cf. Campbell* v. *United States,* 365 U.S. 85, 98 (1961), where the Court raised but did not reach the question of whether Jencks Act sanctions would be applicable in the event the government destroyed Jencks Act material.

---

[4] Defendant made such a motion on April 16, 1975. It was denied without any consideration of evidence, for none could be produced because of the government's failure to record testimony. (App. at pp. 86a-92a.)

III.

The decision below, that the intentional intrusion of government informers within the councils of the legal defense violates none of Crow Dog's rights and does not entitle him to disclosure of the informants' files, conflicts with decisions in other Circuits, is inconsistent with controlling decisions of this Court and raises important questions that should be resolved by this Court.

To the extent they are revealed in the public record in the instant case, the facts concerning the intentional intrusion of government informers into the councils of the integrated legal team handling the defense of the original seven Wounded Knee defendants, including Crow Dog, are recited in the Statement of the Case, *supra,* at pp. 9-14.

Crow Dog and his attorney were not permitted to examine the F.B.I. files of these informers, nor other relevant exhibits that were filed and examined by the courts below *in camera.* However, based upon its examination of the record, and the F.B.I. files on the informer Durham, the Court of Appeals found that:

> There is no evidence in the record that Durham was present during the discussion of any defense strategy relevant to appellant Crow Dog's trial nor is there any indication that he passed on any such information to the F.B.I. Further, by the time of Crow Dog's trial in June 1975 Durham had been exposed as an informant.

> . . . Any close proximity with appellant Crow Dog is neither alleged nor apparent from the record. No prejudice to appellant has been shown to arise from this tangential relationship with his case. (App. at p. 37a.)

On this evaluation of the "facts", essentially untested by adversary process, the Court adopted "the position that in the absence of a showing of actual prejudice:

> [T]here must be the actual gaining, rather than the mere opportunity for gaining, of information relative to a charge against [a] defendant, and the information must be obtained by the informant from intrusion into the attorney-client relationship." (App. at pp. 37a-38a.) (Citation omitted)

According to the court, "no such 'gaining' or 'intrusion' has been shown in the instant case." (App. at p. 38a.)

The rule articulated by the Eighth Circuit, and applied to the untested facts in this case, appears consistent with the rule adopted in several other circuits. *See United States* v. *Zarzour,* 432 F.2d 1 (5th Cir. 1970); *United States* v. *Gartner,* 518 F.2d 633 (2d Cir.), *cert. denied,* —— U.S. ——, 96 S.Ct. 222 (1975). It apparently conflicts, however, with decisions in other circuits that intentional governmental intrusion in the attorney-client relationship is a *per se* violation of a defendant's constitutional rights, especially under the Sixth Amendment. *See Bursey* v. *Weatherford,* 528 F.2d 483 (4th Cir. 1975), *petit. for cert. filed,* —— U.S. ——, 44 U.S.L. Week 3610 (April 19, 1976) (No. 75-1510); *Via* v. *Cliff,* 470 F.2d 271, 275 (3rd Cir. 1972); *United States* v. *Rispo,* 460 F.2d 965, 976 (3rd Cir. 1972); *Taglianetti* v. *United States,* 398 F.2d 558, 570 (1st

Cir. 1968), *aff'd per curiam,* 394 U.S. 316 (1969); *Caldwell* v. *United States,* 205 F.2d 879 (D.C. Cir. 1953); *Coplon* v. *United States,* 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952).

The standard adopted by the Court of Appeals is also inconsistent with the controlling decisions of this Court. In cases involving violations of the Sixth Amendment right to counsel this Court has never required a showing of actual prejudice. Notably, in *Glasser* v. *United States,* 315 U.S. 60, 75-76 (1942), the Court held that a determination of "the precise degree of prejudice sustained" would be "at once difficult and unnecessary." The right to counsel "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." All the Court required a defendant to show was that there was an opportunity for prejudice which "*may conceivably* impair counsel's effectiveness." (Emphasis added.) Certainly this approach has been followed by the Court in recent years, in reversing convictions where the government has unlawfully overheard conversations between defendants and their attorneys. *O'Brien* v. *United States,* 386 U.S. 345 (1967); *Black* v. *United States,* 385 U.S. 26 (1966).

In *Hoffa* v. *United States,* 385 U.S. 293 (1966), this Court expressly acknowledged that government intrusion into the attorney-client relationship properly result in reversals of the trials at which they occur. 385 U.S. at 306-08. *Hoffa* itself, however, involved only the question:

> Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one crim-

inal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required *in a subsequent trial of the same defendant on a different charge.* (385 U.S. at 295, Emphasis added.)

Unlike in *Hoffa,* here the question *is* whether "the Government's intrusion upon the defendant's relationship with his lawyer 'invalidates the trial at which it occurred.'" 385 U.S. at 307.

At the very least, in this case the record raises the question as to whether defendant's counsel, not merely the courts, should be permitted to examine the file showing the intruder's relationship to the case and his reports to the F.B.I. *Alderman* v. *United States,* 394 U.S. 165 (1969); *United States* v. *Huss,* 482 F.2d 38 (2d Cir. 1973); *Taglianetti* v. *United States, supra,* 398 F.2d 558 (1st Cir. 1968), *aff'd per curiam,* 394 U.S. 316 (1969). Especially is this true, where, as here, there is no question of protecting the identity of the informer and neither the government nor the the courts below has provided any reason for refusing to permit defense counsel to inspect the file.

Review of these issues by the Court is especially appropriate at this time. Use and misuse by the federal government of informants has become epidemic. In one recent fiscal year, the F.B.I. reported that 4,800 arrests were made on the basis of informant information. *See* Note, *Police Undercover Agents: New Threat to First Amendment Freedoms,* 37 Geo. Wash. L. Rev. 634 (1969), citing F.B.I. Annual Report. Recent revelations of the F.B.I.'s COINTEL Program, and its promiscuous and lawless use of informers and undercover agents are alarming. *See,*

e.g., Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities: Supplemental Detailed Staff Reports on Intelligence Activities and the Rights of Americans: Book III, pp. 225-270, "The Use of Informants in F.B.I. Domestic Intelligence Investigations" (U.S. Sen. Rep. No. 94-755, April 23, 1976). See also, *Id.,* Book II at pp. 67-82.

Knowledge of these widespread abuses imposes upon every responsible government agency an obligation to scrutinize closely and control such official lawlessness. The occasion is appropriate in the instant case for the Court to conduct plenary review to determine the bearing of such activity on the First, Fourth, Fifth, Sixth and Ninth Amendment rights of criminal defendants, to impose sanctions under the Court's supervisory powers over federal courts and prosecutors, and to establish rules for controlling police and prosecution use of informers.

Sanctions were imposed in *United States* v. *Banks,* 383 F.Supp. 389, 392 (D.S.D. 1974), *app. dismissed,* 513 F.2d 1329 (8th Cir. 1975), a case closely related to the instant one. Use of government informers was not specifically at issue when the trial court dismissed that case, because the government's testimony concerning the informers had not yet been shown to be false. Now it is known to have been false; now it is known that the government had at least one paid informant who intruded within the councils of Crow Dog's legal defense team. The extent of the intrusion, however, remains unknown and untested in adversary proceeding, except for the fact that the government employed some 313 informants during the Wounded Knee affair. (Affidavit of William F. Clayton, R.D. Hurd, and David R.

Gienapp, filed June 16, 1975.) This Court should review the case to determine what judicial steps are appropriate in light of the known facts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

SANFORD JAY ROSEN
ROSEN, REMCHO & HENDERSON
3504 Clay Street
San Francisco, California 94118

JOSEPH REMCHO
ROSEN, REMCHO & HENDERSON
155 Montgomery Street
San Francisco, California 94104

Attorneys for Petitioner

KENNETH TILSEN
400 Minnesota Building
St. Paul, Minnesota
Of Counsel

June 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1617

United States of America,

Appellee,

v.

Leonard Crow Dog,

Appellant.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: November 13, 1975

Filed: March 31, 1976

Before GIBSON, Chief Judge, LAY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

This direct criminal appeal is taken by appellant Leonard Crow Dog following his conviction by a jury of violating 18 U.S.C. §§111 and 2112. It is alleged on this appeal that a variety of trial and pretrial errors committed by the government and by the district court[1] require reversal of that conviction. We find no such reversible error and thereby affirm.

The great majority of the arguments raised on this appeal relate to procedural matters. The facts surrounding the incident which led to the indictment of Leonard Crow Dog are relevant only with regard to his claim that the evidence was insufficient to support his conviction. Accordingly, a thorough recitation of those facts will be reserved until that issue is discussed. However, in order to evaluate appellant's various contentions regarding procedural error, a detailed survey of the history of this case must be set forth.

I.

Appellant Leonard Crow Dog was charged in a three-count indictment handed down by a grand jury in the District of South Dakota on December 12, 1974. These charges arose out of an incident that took place on March 11, 1973, in Wounded Knee, South Dakota, in-

---

1 The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa.

volving the alleged detention of four United States postal inspectors by members of the American Indian Movement (AIM).[2] Count I alleged that Crow Dog willfully impeded, interfered with and intimidated Postal Inspector Gene Graham while he was performing official duties in violation of 18 U.S.C. §§111 and 1114. Count II charged that Crow Dog by force and violence unlawfully took a pistol belonging to the United States from the person of one Jack Hanson in violation of 18 U.S.C. §§1153 and 2112, and Count III alleged that Crow Dog had taken various goods from the Wounded Knee trading post with a combined value in excess of $100, a violation of 18 U.S.C. §§1153 and 661. An identical indictment was returned against Carter Camp. Stanley Holder was indicted separately on counts I and II.

These December 12 indictments superseded indictments which had been returned in March and April of 1973 against these same three men plus Dennis Banks, Russell

---

2 An understanding of the Wounded Knee incident and the role played therein by the American Indian Movement may be gained by reference to a number of district court opinions which evolved from the trial of AIM leaders Dennis Banks and Russell Means. See United States v. Banks, 383 F. Supp. 389 (D.S.D. 1974); United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974).

Means, Pedro Bissonette, and Clyde Bellecourt. The earlier indictments charged all seven men with conspiracy in one count and alleged substantive offenses in ten other counts. In June 1973 these seven defendants moved to consolidate their cases for trial alleging, among other things, that seriatim trials would result in a denial of a speedy trial to some of the defendants. The district court[3] ordered a joint trial for Means and Banks but denied consolidation to the others. Review of that denial was attempted in this court by the filing of a petition for a writ of mandamus which was denied.

In October 1973 these same defendants moved for a change of venue pursuant to Fed. R. Crim. P. 21(a) and, after satisfying the court that prejudice against them existed in South Dakota, venue was transferred to St. Paul, Minnesota. The so-called "leadership" trial of Means and Banks began in January 1974 and ended with the district court's dismissal of all charges against them on September 13, 1974. See United States v. Banks, supra, 383 F. Supp. at 397. As previously noted, superseding indictments naming Crow Dog, Camp and Holder were returned on December 12, 1974. The original 11-count indictments against them were dismissed on February 5, 1975.

---

3 The Honorable Fred J. Nichol, United States District Judge for the District of South Dakota.

Thereafter, Judge Nichol recused himself and reassigned the Crow Dog, Holder, and Camp cases to Judge Edward McManus, sitting by designation in the District of South Dakota.

A pretrial conference on these cases was held on April 16, 1975, at which numerous defense motions were filed seeking, inter alia, dismissal of the charges based upon denial of a speedy trial, bad faith prosecution and governmental misconduct; disclosure of all exculpatory and impeaching evidence by the prosecution; and a determination of venue and transfer from the district. In addition, the government filed a motion to consolidate the indictments against these three men for purposes of trial. On May 2, 1975, the district court transferred venue in these cases to the Northern District of Iowa, Cedar Rapids Division, stating that prejudice against Indians "created a reasonable likelihood of impairing defendants' right to a fair trial in the District of South Dakota." However, the court rejected defendants' argument that the superseding indictments were merely a continuation of the earlier charges brought against these same men and that venue was still in St. Paul, Minnesota, pursuant to Judge Nichol's earlier transfer order. United States v. Holder, 399 F. Supp. 220 (D.S.D. 1975). The government's motion to consolidate was granted by the court on May 12, 1975.

On May 27, 1975, a hearing on the motions regarding the denial of a speedy trial, prosecutorial misconduct, and

discriminatory prosecution began. After three days of testimony, argument and the presentation of extensive documentary evidence on each of these issues, the motions to dismiss were taken under advisement by the court.

In an order entered on May 30, 1975, the district court disposed of the various discovery motions that had been filed by defendants. In summary, the court denied a request to examine all government files in camera for exculpatory evidence, ordered the government to provide defendants prior to trial with any information concerning government witnesses which bore on their credibility, and further ordered the government to produce for the court's in camera inspection the names and files of all informants involved in the case.

The consolidated trial against these three defendants commenced with the institution of the jury selection process on June 2, 1975. Pursuant to a defense motion, counsel for both sides were allowed to supplement the court's voir dire of the jury with their own questioning of individual jurors. The jury selection process took an entire day, the great majority of which was consumed by questions asked by counsel for the three defendants.

The prosecution began presenting its case following the swearing in of the jury and opening statements on June 3, 1975. After two and one-half days of testimony, principally by three of the postal inspectors who were involved in the Wounded Knee incident, the prosecution rested. Motions to strike certain

testimony and for a judgment of acquittal based upon insufficiency of the evidence were made by defense counsel and denied by the court. Defendants rested without presenting any testimony and immediately renewed their motion for judgment of acquittal. That motion was once again denied by the court. The jury returned a guilty verdict against Crow Dog and his co-defendants as to all charges on June 5, 1975.[4]

A post-trial motion was filed on June 27, 1975, in which the defendants sought a judgment of acquittal or a new trial based primarily upon the grounds of sufficiency of the evidence, the government's failure to disclose evidence, and problems with the in-court identification of the defendants. A second post-trial motion was filed on July 25, 1975, seeking an evidentiary hearing on the basis of newly discovered evidence, i.e., a group of photographs which were allegedly used for the purpose of identifying defendants and which had been suppressed by the government. The motion contended that the photographs included pictures of the defendants, that they had been shown to the postal inspectors on the day of the incident, and that no identification of defendants was made at that

---

[4] Count III of the December 12, 1974, indictments handed down against Camp and Crow Dog was severed prior to trial and then dismissed by the government following the jury's verdict.

time. All of these motions were denied by the district court in a lengthy memorandum and order filed on August 4, 1975. United States v. Crow Dog, 399 F. Supp. 228 (N.D. Iowa 1975). On August 5, 1975, Crow Dog was sentenced to three years on Count I and eight years on Count II, the sentences to run concurrently. Execution of the sentences was suspended and Crow Dog placed on probation for a period of five years. Co-defendants Holder and Camp failed to appear for sentencing.

II.

The first issue which we consider on this appeal is that of venue. Appellant contends that the trial court erred in ruling that the superseding indictments began an independent prosecution which required a new determination of venue. 399 F. Supp. at 224-27. This, it is contended, violated appellant's constitutional right against having venue changed against his consent, as well as rights that he enjoyed under Fed. R. Crim. P. 21(a). Appellant further alleges that principles of collateral estoppel and law of the case precluded the district court from "overruling" the prior transfer of venue to St. Paul, Minnesota, by Judge Nichol. We disagree.

The Constitution in Article III, section 2, and the Sixth Amendment affords a defendant in a criminal trial the right to be tried in the state and district where the alleged crime occurred. However, the Sixth Amendment also provides

the right to a fair trial before an impartial jury. This latter right is deemed to be a fundamental element of due process. Singer v. United States, 380 U.S. 24, 36 (1965); In re Murchison, 349 U.S. 133, 136 (1955); United States v. McNally, 485 F.2d 398, 402 (8th Cir. 1973), cert. denied, 415 U.S. 978 (1974). In recognition of this right, it is well-established that pre-trial publicity may have had such an impact upon the populace from which the jury is drawn as to create a probability or at least a "reasonable likelihood" that this right of impartiality has been violated. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Irwin v. Dowd, 366 U.S. 717, 721 (1961); Wansley v. Slayton, 487 F.2d 90, 92-98 (5th Cir. 1973), cert. denied, 416 U.S. 994 (1974). With this contingency in mind, Fed. R. Crim. P. 21(a) provides for transfer of venue by the district court upon a motion by the defendant to that effect and a proper showing of prejudice. See United States v. Delay, 500 F.2d 1360, 1365 (8th Cir. 1974); United States v. McDaniel, 449 F.2d 832, 841-42 (8th Cir. 1971), cert. denied, 405 U.S. 992 (1972). A prerequisite to a transfer determination is that an indictment or information stating the charges is on record. In re Investigation of World Arrangements, 107 F.Supp. 628, 630 (D.D.C. 1952); mandamus denied sub nom. In re Texas Co., 201 F.2d 177 (D.C. Cir.), cert. denied, 344 U.S. 904 (1952).

Appellant Crow Dog made such a Rule 21(a) motion in the District of South Dakota following his indictment on 11 counts in 1973. The district court

granted the motion and transferred venue to St. Paul, Minnesota. However, that indictment was dismissed in early 1975 pursuant to Fed. R. Crim. P. 48(a). The effect of this dismissal was to bring that prosecution to an end. See generally Gonzalis v. Lynch, 282 P.2d 255, 257 (Okla. Crim. 1955). The superseding three-count indictment began an independent prosecution. Venue as to that indictment was properly set in South Dakota, the state and district where the alleged crimes took place. Any prior transfer of venue in a previous indictment had no effect on the subsequent indictment. Allowing an initial transfer of venue to bind all subsequent indictments brought against that defendant out of a common factual setting as urged by appellant would be inconsistent with the interplay of constitutional rights reflected in Fed. R. Crim. P. 18 and 21(a).[5] The district court's decision regarding venue did not constitute an abuse of discretion. Rizzo v. United States, 304 F.2d 810, 817 (8th Cir.), cert. denied,

---

5

A defendant is, of course, entitled to seek a transfer of venue subsequent to the filing of a superseding indictment and the dismissal of the original indictment on which transfer had been granted. In ruling on that motion, the court could take judicial notice of the evidence adduced at the previous hearing on the transfer issue and accord it whatever weight it sees fit. Such a motion was made in the instant case resulting in

371 U.S. 890 (1962). See also United States v. Jobe, 487 F.2d 268, 269 (10th Cir. 1973), cert. denied, 416 U.S. 955 (1974).

Appellant's contentions with regard to the applicability of collateral estoppel and law of the case principles to the initial transfer of venue to St. Paul are entirely without merit. Collateral estoppel prevents the relitigation of an issue previously determined between parties or their privies. See Ashe v. Swenson, 397 U.S. 436, 443-44 (1969). The venue of the superseding indictment was not such an issue. As previously noted, the theory of one continuous prosecution against Crow Dog has been rejected. The only issue determined by the prior transfer order was that a fair trial could not be held in the District of South Dakota at that point in time with regard to that particular indictment. Collateral estoppel is not applicable. Further, the principles of law of the case are inapplicable by virtue of similar reasoning. The selection of the transferee district was within the court's discretion under Fed. R. Crim. P. 21(a).

---

5 cont.
the transfer of the action to the Northern District of Iowa. Under Fed. R. Crim. P. 21(a) the court is not required to transfer the proceedings to the district specified in defendant's motion.

III.

The next issues we consider relate to alleged deficiencies and errors in the discovery process attributable to the government. Appellant contends that the district court erroneously admitted evidence at trial which had not been properly disclosed to the defense prior to trial and further that the court erred in denying appellant's motion for a new trial based upon the discovery of purportedly exculpatory evidence which had been suppressed by the government in violation of the dictates of Brady v. Maryland, 373 U.S. 83 (1963). Our examination of both these issues discloses no basis for relief.

Appellant argues initially that the admission of certain evidentiary "surprises" by the government fatally tainted the trial and conviction. That evidence included testimony by two of the postal inspectors with regard to actions and statements by appellant Crow Dog during the Wounded Knee confinement which had not been previously revealed. This evidence included inconsistencies with and additions to prior statements made by the inspectors as to the role played by the appellant during the incident. Further, the government introduced at trial a picture of Crow Dog's co-defendants which had not been shown to defense counsel prior to that time. Although the United States Attorney supplied defense counsel prior to trial with a ten-page general narrative statement outlining the prosecution's evidence, it is alleged that the failure to disclose these specific items of evidence should have rendered them inadmissible at trial. We disagree.

Discovery matters are committed to the sound discretion of the district court and are reviewable only upon an abuse of that discretion. United States v. Swanson, 509 F.2d 1205, 1209 (8th Cir. 1975); United States v. Cole, 453 F.2d 902, 905 (8th Cir.), cert. denied, 406 U.S. 922 (1972). It is well established that

> an error in administering the discovery rules is not reversible absent a showing that the error was prejudicial to the substantial rights of the defendants.

United States v. Cole, supra, 453 F.2d at 904.

In the instant case appellant makes no specific contention as to any prejudice which flowed from the nondisclosure of these evidentiary specifics, nor is any prejudice apparent from the record. We note that the photograph in question appeared in a local newspaper at the time of the incident and was easily obtainable by the defense. With regard to the postal inspectors' "surprise" testimony, the record reveals that the inspectors were thoroughly cross-examined as to variances in their recollections of Crow Dog's participation in the alleged crimes. While defense counsel contends they were surprised by certain portions of testimony,

at no time was a continuance sought on that basis. Since no showing of prejudice has been made, we find no abuse of the district court's discretion in admitting this evidence over defense objections.

A more difficult question is presented with regard to appellant's allegation that the government failed to disclose exculpatory evidence to the defense in violation of the dictates of Brady v. Maryland, supra. The evidence in question consists of a group of photographs which were allegedly shown to the postal inspectors by FBI agents at Pine Ridge, South Dakota, very shortly after the inspectors had been released by the Indians. It is claimed that the postal inspectors were unable to identify any of the defendants in these photographs. Our careful examination of the record in this case convinces us, however, that nondisclosure of these photographs did not constitute reversible error. The existence and content of the photographs described by defense counsel are open to serious doubt. But even assuming the photographs' existence, their use would have been confined to minimal impeachment purposes and thus they were not sufficiently material to the issue of innocence or guilt to require reversal or remand of this case.

It appears from the record that the inspectors were shown a "stack of photographs" on the day of the incident in the FBI headquarters at Pine Ridge, South Dakota, and that they did not at that time identify appellant Crow Dog or either of the co-defendants from those

pictures. However, these photos have never been specifically identified by the government. The prosecution represented to the trial court and to this court that there was no record kept as to which pictures or photos were shown to the inspectors at that time. Based upon photographs which were known to be available to the FBI agents at the place and time in question, the government stated that the pictures were probably of persons who had been arrested during incidents in Custer and Rapid City, South Dakota. Since Crow Dog was not arrested on either of those occasions, there would be no picture of him among the group. Thus, those photographs would be of no particular use in his defense.

Appellant's counsel contends, however, that there is a very high probability that Crow Dog is among those pictured in the heretofore unidentified photographs. Further, he alleges here, as he did in a post-trial motion to the same effect in the trial court, that a series of events unrelated to this litigation gave him knowledge of the existence of some 60 photographs contained in two named FBI files which were, he believes, the ones shown to the inspectors following their release. Appellant does not believe that the pictures were merely mug shots of persons arrested at those two incidents. Rather, he believes that they were taken at the scene on those two dates and, given appellant Crow Dog's prominent role in those incidents, there existed a substantial probability that he would be pictured in one or more of the photo-

graphs. No hearing was conducted by the district court on this issue. However, the court in its August 4, 1975, order stated that the motion for post-trial relief on Brady grounds did not "set forth a sufficient basis relevant to the cases at bar to warrant a new trial." 399 F. Supp. at 242. Appellant now contends that the nondisclosure of the photographs, following the request that they be produced, constituted a Brady violation which requires that a new trial be granted. At the very least, it is urged that Crow Dog is entitled to an evidentiary hearing at which the photographs could be viewed and their prior use, if any, for identification purposes could be ascertained.

Initially, we note that appellant's contention that he is among those pictured in the photographs allegedly shown to the inspectors is highly speculative and based upon very thin evidence. The FBI 302 report, which came into the hands of appellant Crow Dog's attorney in connection with a wholly unrelated criminal matter, refers to a stack of 60 photographs which the agent viewed at the FBI command post in Pine Ridge, South Dakota, on the afternoon of March 11, 1973, the same day and time that the postal inspectors were there viewing photographs. The agent's report, written on the date of that incident, states that he looked at photos "of individuals who had been arrested at Custer, South Dakota, on February 6, 1973, and in Rapid City, South Dakota, on February 9, 1973." The prosecution has in this action consistently maintained that it was these same arrest

photographs that were shown to the postal inspectors that day. Our examination of the affidavits and the other materials presented to the district court convinces us that it is entirely plausible, if not probable, that the photographs shown to the inspectors were mug shots of persons arrested in those two earlier incidents and did not include appellant Crow Dog. Given the highly speculative nature of the allegations raised by appellant Crow Dog in his post-trial motion, we do not believe that the district court erred in failing to hold a post-trial evidentiary hearing on this matter.

Even assuming, arguendo, that appellant's contentions with regard to the photographs would be sufficient under ordinary circumstances to require a hearing, it is our view that a remand for a hearing in this case would serve no useful purpose. Careful examination of the record convinces us that the evidentiary use of the photographs could not have constituted the type of exculpatory evidence which would have required the granting of a new trial under Brady standards.

In Evans v. Janing, 489 F.2d 470, 474-78 (8th Cir. 1973), this court fully explored the Brady standards and adopted the three-pronged test from Moore v. Illinois, 408 U.S. 786 (1972), for use in testing a claimed violation of due process on these grounds. Under that test the relevant factors are "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the

evidence." 408 U.S. at 794-95. See Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975). See generally United States v. Librach, 520 F.2d 550 (8th Cir. 1975); United States v. Agurs, 510 F.2d 1249, 1252-54 (D.C. Cir. 1975).

The first prong of the Moore test was met in the instant case. Sufficient request was made for all exculpatory evidence prior to trial and the specific photographs in question were sought by counsel during the trial. However, there is no evidence in the record to support a finding that the prosecutor deliberately and in bad faith suppressed these photographs. Rather, the suppression here, if any, appears at most to be in the realm of negligent nondisclosure. As such, the appellant must provide "some showing of fundamental unfairness as a result of the suppression in order to merit relief." Ogden v. Wolff, supra, 522 F.2d at 821.

With regard to the second prong of the Moore test, it was noted by this court in Evans v. Janing, supra, 489 F.2d at 476, that information indicating the failure of a witness to identify the defendant would be "potentially useful to the defendant and therefore favorable to his defense." The slight burden under this element of the test is easily satisfied here.

The third prong, the materiality of the suppressed evidence, is the most difficult test to satisfy under Moore. Appellant contends that the suppressed photographic evidence, assuming that Crow Dog is pictured therein, is highly material to the issues of the alleged-

ly tainted in-court identification of Crow Dog and the general credibility of the inspectors. We do not agree inasmuch as appellant Crow Dog's presence in Wounded Knee at the time in question is not in serious dispute.

In our view the nature of the suppressed evidence is such that it could not have been used by skilled counsel to develop "a reasonable doubt of guilt in the minds of enough jurors to avoid a conviction." Shuler v. Wainwright, 491 F.2d 1213, 1223 (5th Cir. 1974) quoting from United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969). See also Ogden v. Wolff, supra, 522 F.2d at 822; Evans v. Janing, supra, 489 F. 2d at 477 & n.19; United States v. Kahn, 472 F.2d 272, 289 (2d Cir.), cert. denied, 411 U.S. 982 (1973). A review of the record in the instant case fully illustrates the limited utility this evidence would have had at trial.

Appellant's claim of materiality with regard to in-court identifications of him by the postal inspectors is apparently based upon his belief that with the addition of the suppressed photographic evidence the court would have found that the in-court identifications were so tainted as to preclude their reliability. See Neil v. Biggars, 409 U.S. 188, 196-201 (1972); Simmons v. United States, 390 U.S. 377, 382-86 (1968). See generally United States v. Wade, 388 U.S. 218 (1967). In our view the record of the thorough taint hearings conducted by the trial court as to each inspector adequately rebuts this charge and supports the district court's

conclusion that an independent basis for identification existed in each instance.

Similarly, the suppressed identification evidence could not have had such a major bearing on the credibility of the postal inspectors as to require a new trial under Brady standards. Appellant argues on this appeal that his identification "as the person who committed certain acts is the key issue in this case." We agree. However, we do not agree with appellant's statement that the suppressed evidence " is material to the question of innocence or guilt and should be presented to the jury."

It is readily apparent from the record that the identification of appellant Crow Dog as being a person who was in the museum at some time during the course of the postal inspectors' detention is beyond question. Nor does there seem to be any significant doubt concerning the fact that Crow Dog lectured the postal inspectors during their captivity on a variety of issues relating to Indian problems. The entire thrust of Crow Dog's trial defense was predicated on the contention that he could not be found guilty of aiding and abetting a robbery on evidence that merely established that he came in and gave a speech. This point was emphasized by counsel for Crow Dog in his opening statement and closing arguments to the jury. Further, defense counsel stated to this court in oral argument that he did not believe that Crow Dog's presence within the museum in the role of a lecturer was "an issue."

Thus it seems clear that the suppressed evidence would not have proved or disproved appellant Crow Dog's presence at the scene of the incident. Instead, appellant would have used the suppressed evidence for the purpose of impeaching the postal inspectors with respect to their subsequent identification of Leonard Crow Dog as a man who did certain acts in addition to lecturing while inside the museum. The in-court identification of Leonard Crow Dog at the scene by the postal inspectors was strong and not seriously questioned. However, there were contradictions and inconsistencies in their testimony on the issue of Crow Dog's role in the incident. These areas were fully explored in lengthy cross-examination by all three able defense attorneys. In many respects, the claimed suppressed identification evidence would have been cumulative. In any event, the evidence could not have played a determinative role in the outcome of the trial. It was not sufficiently material on the ultimate question of guilt or innocence so that its suppression constituted a violation of due process. See Giglio v. United States, 405 U.S. 150, 153-54 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959).

In conclusion, we find that while there may have been a negligent nondisclosure by the prosecution of favorable evidence following the request by the defense for production of same, the evidence in question completely fails to satisfy the materiality standards required by Moore and therefore does not warrant further hearing or the granting

of a new trial on the basis of a violation of due process.

IV.

The next contention raised by appellant is that he was denied his right to speedy indictment and trial as guaranteed by the Fifth and Sixth Amendments and by Fed. R. Crim. P. 48(b). We disagree.

It is alleged that the period between Crow Dog's initial indictment on April 10, 1973, and the commencement of trial on June 2, 1975, constituted a delay sufficient to require dismissal of the indictment pursuant to the guidelines established by the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). The "ad hoc" balancing test from Barker requires consideration of the following factors in determining whether a constitutional violation has occurred: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, supra, 407 U.S. at 530 (footnote omitted). The delay in the instant case, when viewed in light of these factors, was not constitutionally fatal.

We find initially that the length of the delay in the instant case is sufficient to trigger further inquiry. It should be noted, however, that the complexity of the Wounded Knee cases generally serves to justify a somewhat longer delay than would ordinarily have been permitted prior to a finding that the defendant had been presumptively prejudiced. See Barker v. Wingo, supra, 407 U.S. at 530.

The second factor, the reasons for the delay, does not weigh heavily in the balancing process for or against either side in this case. Rather, our examination reveals that the delay was occasioned by primarily "neutral" factors. See Barker v. Wingo, supra, 407 U.S. at 531.

It is important to keep in mind the fact that the sheer magnitude of the Wounded Knee incident placed a heavy burden on the federal courts responsible for the prosecutions arising therefrom. Allocation of manpower and resources was of no little concern to both the prosecution and the defense in their preparation. In addition, the logistics of bringing to trial a large number of persons on a wide variety of charges required a more protracted period for discovery and pretrial matters than would normally be expected. Further, the nine month trial of Dennis Banks and Russell Means after denial of the motion to consolidate necessarily postponed the non-leadership trials. For example, defense counsel for Crow Dog in this action was counsel for Russell Means in that trial and the resultant appeal process. Finally, the government's acquisition of a superseding indictment against Crow Dog in December 1974 on substantive charges which were not previously brought required that further preparation time be allowed to both sides. We note that a speedy trial was had on those substantive charges with less than seven months elapsing between the time of the superseding indictment and the conviction of appellant Crow Dog which is now on appeal.

We have taken into consideration all of these factors in analyzing the reason for the delay. While responsibility for the delay appears to rest in some measure on both the prosecution and defense, we realize that the government must ultimately bear the greater share. However, it is clear that, to the extent the government is responsible for the delay, it was not done in "an attempt to gain a tactical advantage over the defendant or to harass him." United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975). Thus, on balance, we are not inclined to give this factor great weight for or against either side in determining whether or not a denial of speedy trial has taken place.

Appellant has also failed to satisfy the remaining two Barker elements. First, there was no clearly articulated assertion of defendant's right to a speedy trial. Appellant contends that his motion to consolidate contained language which was tantamount to such a request, in that it stated that unless consolidation was granted Crow Dog and the other non-leadership defendants would be denied that right. The trial court, in its discretion, denied the motion. No subsequent demand for a speedy trial was made by Crow Dog. Nor did defense counsel express any particular interest in separate simultaneous trials of all Wounded Knee defendants. To have done so, it is now contended, would have been inconsistent with concepts of due process and fairness. Under these unusual circumstances we find no active assertion of the right to a speedy trial by appellant Crow Dog. A request for a speedy

trial will not be inferred from a set of facts such as these which indicate that the desire for a prompt trial was conditioned upon a grant of the consolidation motion.

Finally, we are unpersuaded that any cognizable prejudice has occurred to Crow Dog as a result of the delay. The Supreme Court in Barker specified that the three major concerns in this area of prejudice were "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532 (footnote omitted). Appellant Crow Dog was free on bond throughout the entire pendency of this action and thus has no claim based on oppressive incarceration. It is claimed, however, that his preparation of an effective defense was impeded by the passage of time. This contention is wholly unmeritorious. The discovery taken by the Wounded Knee Legal Defense/Offense Committee was, from its inception, for the benefit of all defendants in criminal actions arising out of the Wounded Knee incident. Appellant admits in his brief that much of the testimony offered against him at his trial had been previously given at the Means/Banks trial. Any "fading of memories" could have been revived and refreshed by those prior transcripts.

As to the August 1974 death of Angel Martinez, an eye-witness to the events in the museum, we conclude that any claim of resultant prejudice is based entirely on speculation. The record before this court does not indi-

cate what Martinez' testimony would or could have been. Where, as here, no specific claim of prejudice is made and where eyewitness testimony abounds,[6] the fact that a possible witness died during the delay will not be weighed heavily in the balance.

Thus, appellant Crow Dog is confined to a claim of general prejudice arising from the strain of being under indictment and subject to the possibility of a lengthy prison term. However, that allegation by itself "does not establish prejudice where, as here, the defendant neither asserts nor shows that the delay weighed particularly heavily on him in specific instances." Morris v. Wyrick, 516 F.2d 1387, 1391 (8th Cir. 1975). See also United States v. Baumgarten, 517 F.2d 1020, 1025 (8th Cir. 1975); United States v. Cummings, 507 F.2d 324, 330 (8th Cir. 1974).

After careful consideration of the four factors from Barker, we are satisfied that no denial of the right to a speedy trial occurred in the instant case.

Appellant further alleges that his rights under the Fifth Amendment were denied by virtue of the delay in issuing

---

6 The transcripts reveal that during the period of the postal inspectors' captivity somewhere between 40 and 50 spectators were in or near the museum.

the superseding indictment. See United States v. Marion, 404 U.S. 307 (1971). This claim is without merit. The standard employed in determining whether prejudice has taken place as a result of pre-indictment delay is "whether the delay has impaired the defendant's ability to defend himself." United States v. Golden, 436 F.2d 941, 943 (8th Cir.), cert. denied, 404 U.S. 910 (1971). See also United States v. Jackson, 504 F.2d 337 (8th Cir. 1974), cert. denied, 420 U.S. 964 (1975). We agree with the district court's finding that there has been no showing to substantiate appellant's claim of prejudice or intentional delay. See United States v. Jackson, supra, 504 F.2d at 339 n.2; United States v. Rucker, 496 F.2d 1241, 1242-44 (8th Cir. 1974). Although the superseding indictments were not handed down until some 20 months after the incident, Crow Dog had been under indictment for a crime encompassing the same set of events during almost that entire period. Any defense efforts made in regard to that first indictment carried over to the second and thus negated the chance of an impaired defense. The district court's finding in this regard is not clearly erroneous. United States v. Jackson, supra, 504 F.2d at 341.

Similarly unmeritorious is appellant's contention that the district court erred in failing to dismiss his case for want of prosecution under Fed. R. Crim. P. 48(b). That rule gives the court discretion to dismiss an indictment for unnecessary delay even if no

Sixth Amendment violation is found. See United States v. Clay, 481 F.2d 133, 135 (7th Cir.), cert. denied, 414 U.S. 1009 (1973). This court has held, however, that most of the same factors which are relevant for Sixth Amendment purposes are applicable to Rule 48(b) motions. See Hodges v. United States, 408 F.2d 543, 551 (8th Cir. 1969). Having already discussed the Barker standards at length and found no denial of Sixth Amendment rights, we conclude that the district court's denial of a dismissal pursuant to Rule 48(b) was not an abuse of discretion. See Hodges v. United States, supra, 408 F.2d at 551.

V.

We next review appellant's claim that the evidence presented against him at trial was insufficient as a matter of law to sustain his conviction as an aider and abettor. It is asserted that the government's testimony failed to show that Crow Dog did any affirmative act to further the accomplishment of the criminal acts charged, namely, robbery of a pistol belonging to the United States and intimidation of an interference with the performance of duties by a federal postal inspector. In evaluating this contention, we are guided by the principle that this court must view the evidence in the light most favorable to the verdict and accept all reasonable inferences that flow therefrom. United States v. Baumgarten, 517 F.2d 1020, 1026 (8th Cir. 1975); United States v. Wiebold, 507 F.2d 932, 933 (8th Cir. 1974); United States v. Britton, 500

F.2d 1257, 1258 & n.4 (8th Cir. 1974); Koolish v. United States, 340 F.2d 513, 519 (8th Cir.), cert. denied, 381 U.S. 951 (1965).

Applying that standard to the instant case, we find that the evidence is sufficient to support appellant Crow Dog's conviction on both counts. Aiding and abetting requires proof by the government

> that the defendant had a "purposeful attitude" and in some manner participated in the unlawful deed. United States v. Hill, 464 F.2d 1287 (8th Cir. 1972); United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). See also United States v. Atkins, 473 F.2d 308, 310-13 (8th Cir.), cert denied, 412 U.S. 931, 93 S. Ct. 2751, 37 L.Ed.2d 160 (1973). Essentially, this requires the existence of "some affirmative participation which at least encourages the perpetrator." United States v. Thomas, 469 F.2d 145, 147 (8th Cir. 1972). See also United States v. Wiebold, 507 F.2d 932, 934 (8th Cir. 1974).

United States v. Baumgarten, supra, 517 F.2d at 1027. See also Perriea v. United States, 347 U.S. 1, 9 (1954); Nye & Nissen v. United States, 336

U.S. 613, 618-19 (1949).

Evidence was presented in this case which showed that appellant Crow Dog (1) met the postal inspectors outside the museum building in which they were subsequently held and informed them that they were "prisoners of war" and would be treated accordingly; (2) entered the building with the inspectors and repeated the prisoner of war statement to them as they were being bound and gagged; (3) lectured the captive inspectors on the problems of Indian people in the areas of health and education;[7] (4) warned that the inspectors might be carrying concealed recording or radio transmitting equipment on their bodies and that they should be searched; and, (5) took keys to a locked briefcase from one of the inspectors. We feel that this evidence

---

7 Appellant contends, somewhat imprecisely, that the act of lecturing would not have provided a sufficient basis in and of itself to support his conviction as an aider and abettor, especially with regard to the alleged act of robbery. By virtue of the fact that there is other evidence in the record from which Crow Dog's active role in the incident can be inferred, we need not reach this question. It is our view, however, that appellant Crow Dog's act of speech loses its First Amendment protection when coupled with criminal activity.

provides sufficient support for the jury's finding that Crow Dog aided and abetted the commission of the crimes charged.

The fact that the testimony of the postal inspectors contains various minor inconsistencies regarding the precise role played by appellant Crow Dog does not require a contrary result. The resolution of any such inconsistencies and contradictions is left to the jury. Likewise, the matter of the identification of Crow Dog by the inspectors, discussed supra in another context, was fully ventilated before the jury and committed to them for ultimate determination. See Glasser v. United States, 315 U.S. 60, 80 (1942).

VI.

The next issue which we consider is appellant's allegation that he was the victim of discriminatory and bad faith prosecution and governmental misconduct. A motion to dismiss was filed in the district court prior to trial based on these same reasons. In a post-trial order entered on August 4, 1975, the district court held that, after careful examination of the voluminous record in this case and in the other Wounded Knee cases, these contentions by appellant Crow Dog were not substantiated. 399 F. Supp. at 234-38. We agree.

As recently stated by this court in United States v. Swanson, 509 F.2d 1205, 1208 (8th Cir. 1975):

> It is well established that a reasonable prosecutorial discretion is inherent in our judicial system, United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974), and that such discretion does not amount to unconstitutional discrimination unless it is deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification, United States v. Alarik, 439 F.2d 1349 (8th Cir. 1971).

Further, we are guided by the principle that "[t]he presumption is always that a prosecution is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice." United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973) (en banc).

In order to overcome this presumption the defendant bears the burden of proving that he was singled out for prosecution while others similarly situated were not indicted, and that the decision to prosecute him was in bad faith and based upon impermissible considerations. These two essential elements are sometimes referred to as "intentional and purposeful discrimination." United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). See also United States v. Swanson, supra, 509 F.2d at 1208-09; United States v. Ortega-Alvarez, 506 F.2d 455, 458 (2d Cir. 1974), cert. denied, 421 U.S. 910 (1975); Tollett v. Laman, 497 F.2d 1231, 1233 (8th Cir.), cert. denied, 419 U.S. 1088 (1974).

The record in the instant case fails to disclose any such impermissible motive on behalf of the prosecution. At the hearing which was held by the district court on this issue, evidence was presented which showed (1) that the conviction rate in Wounded Knee cases was significantly lower than the national average; (2) that non-AIM members have not been prosecuted for violent criminal conduct, nor have incidents of violence involving those persons been meaningfully investigated; and, (3) that non-AIM Indians who participated in a roadblock incident similar in some respects to the case at bar were not prosecuted. The trial court carefully analyzed all of the evidence, including FBI investigatory files, and concluded that "defendants' three categories of evidence, neither individually nor cumulated, show an intentional selection of these defendants for prosecution based on their affiliation with and activities in the American Indian Movement." 399 F. Supp. at 236. The record in the instant case is devoid of any evidence which indicates that appellant Crow Dog was intentionally singled out for prosecution. Accordingly, we uphold the order of the district court denying defendant's motions to dismiss on this basis.

Appellant's argument regarding alleged governmental misconduct is similarly without merit. It is contended that the activities of the government outlined by the court in United States v. Banks, 383 F. Supp. 389, 393-97 (D.S.D. 1974) have been

carried over into this case. Specifically, appellant Crow Dog decries the use of informants placed in the defense camp by the government, the resulting cover-up of that use, and the failure by the government to comply with various pretrial discovery orders. He contends that these acts amounted to a deprivation of due process and an abuse of the judicial system which requires a reversal of the conviction and a dismissal of the indictment.

Accusations such as these are, of course, a serious matter. Courts must guard against the abuse of the judicial process. As stated by the Supreme Court in McNabb v. United States, 318 U.S. 332, 340 (1942), "[j]udicial supervision of the administration of justice in federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." See also Communist Pary v. Subversive Activities Control Board, 351 U.S. 115, 124 (1956). In discharging this supervisory function the courts have the latitude to fashion remedies that include those sought in the instant case. However, the court in United States v. McCord, 509 F.2d 334, 348-51 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975), while noting that "serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused," id. at 349, also recognized that the desire to deter prosecutorial misconduct

"does not eliminate consideration of prejudice [to the accused] altogether." Id. at 350. The record in the instant case fails to disclose that any prejudice accrued to appellant Crow Dog by virtue of the alleged acts of government misconduct and therefore we find no basis for relief.

The trial court analyzed the alleged instances of misconduct, specific and general, which were presented by the appellant. It found that the majority of the incidents took place during the trial of other Wounded Knee defendants, especially AIM leaders Dennis Banks and Russell Means. No attempt was made to prove that any prejudice to this defendant resulted from those incidents. In the absence of such proof, it will not be presumed that the misconduct of the government in one case carries over to another case.

There is one instance of alleged government misconduct which merits special attention in this case. Appellant has alleged here and in other recent cases before this court that the presence in the Wounded Knee defense camp of an operative paid by the government constituted a denial of due process in that it subverted the attorney-client relationship. Our examination of the record in this case shows conclusively that no such denial of Crow Dog's rights occurred.

The informant, Douglas Durham, had worked in various undercover capacities prior to the Wounded Knee incident. His relationship with the FBI began in March 1973 when he supplied the FBI office in Des Moines, Iowa, with copies of photographs he had taken in a one-day visit to Wounded Knee. He later served in various leadership positions within AIM, including national security director and national administrator. He became a close companion of AIM leader Dennis Banks during the period including the Banks-Means trial in St. Paul. Throughout this period of intimate affiliation with AIM and its leaders he was supplying information to the FBI.

Appellant Crow Dog contends that Durham had access to the legal files prepared by the Wounded Knee Legal Defense/Offense Committee that represented him and most other persons charged in Wounded Knee related incidents. It is further alleged that Durham was present at conferences between the attorneys and clients in St. Paul during the Banks-Means trial and during other such conferences in Lincoln, Nebraska, in January 1975. These conferences allegedly included discussion of legal matters and defense strategy common to all Wounded Knee defendants, thus affording Durham the opportunity to reveal such plans to the FBI and federal prosecutors. Appellant contends that this activity constituted gross misconduct requiring reversal of his conviction in accordance with the principles established in Hoffa v. United States, 385 U.S. 293, 306-08 (1966), and

South Dakota v. Long, 465 F.2d 65, 71-72 (8th Cir. 1972), cert. denied, 409 U.S. 1130 (1973). We disagree.

We have carefully studied the record in this case and have viewed the FBI files on Durham which were examined by the district court in camera. There is no evidence in the record that Durham was present during the discussion of any defense strategy relevant to appellant Crow Dog's trial nor is there any indication that he passed on any such information to the FBI. Further, by the time of Crow Dog's trial in June 1975 Durham had been exposed as an informant.

The record here merely indicates that during the period of Durham's service as an informant for the FBI he occupied various leadership positions within AIM and was a confidant of Dennis Banks. Any close proximity with appellant Crow Dog is neither alleged nor apparent from the record. No prejudice to appellant has been shown to arise from this tangential relationship with his case. We adopt the position that in the absence of a showing of actual prejudice:

> [T]here must be the actual gaining, rather than the mere opportunity for gaining, of information relative to a charge against [a] defendant, and the information must be obtained by the informant from intrusion into the attorney-client relation-

ship.

United States v. Cooper, 397 F. Supp. 277, 285 (D. Neb. 1975). No such "gaining" or "intrusion" has been shown in the instant case.

VII.

The two remaining issues raised by appellant Crow Dog on this appeal are of little merit and are entitled to only summary consideration. The first argument involves the refusal by the trial court to allow individualized voir dire of the prospective jurors outside the presence of each other. A motion to this effect was made by defense counsel and denied by the court. Appellant alleges that the nature of this case, the publicity that surrounded the Wounded Knee incident, and the racial prejudice that exists generally against American Indians necessitated that this extra protective measure be taken in order to assure a fair trial.

We note initially that pursuant to Fed. R. Crim. P. 24(a) the trial judge in his discretion may permit the attorneys in an action to ask questions of individual prospective jurors. In the instant case the court afforded great latitude to defense counsel in their questioning. One full day was spent selecting the jury. The entire trial, including the voir dire, lasted only three and one-half days. Each potential juror was carefully examined as to his or her exposure to the Wounded Knee incident through the media and

was thoroughly questioned as to possible prejudice against Indians. Such in-depth probing of individual jurors fully comported with the standards laid down in this court's recent decision in United States v. Bear Runner, 502 F. 2d 908, 912-13 (8th Cir. 1974). Refusal to allow individual, segregated voir dire was not an abuse of the trial court's broad discretion in this area. See United States v. Bear Runner, supra, 502 F.2d at 911.

Finally, appellant charges that the intentional failure by the government to have the grand jury testimony of law enforcement personnel recorded constituted error. This court has consistently held that "there is no constitutional or statutory requirement that grand jury testimony be recorded." United States v. Biondo, 483 F.2d 635, 641 (8th Cir. 1973), cert. denied, 415 U.S. 947 (1974). See also United States v. Arradondo, 483 F. 2d 980, 984 (8th Cir. 1973), cert. denied, 415 U.S. 924 (1974); United States v. Harflinger, 436 F.2d 928, 930 (8th Cir. 1970), cert. denied, 402 U.S. 973 (1971). But see United States v. Thoresen, 428 F.2d 654, 666 (9th Cir. 1970); United States v. Cianchetti, 315 F.2d 584, 591 (2d Cir. 1963). We see no reason to depart from our holdings in the instant case.

In summary, we find that appellant Crow Dog has failed to assert any basis for the reversal of his conviction in the instant case. The trial court afforded defendants and defense counsel great latitude in the course of the

trial. In the absence of any showing of prejudicial error or abuse of discretion by the trial court, appellant Crow Dog's convictions on both counts must be affirmed.

LAY, Circuit Judge, Concurring.

I concur in Judge Stephenson's thorough opinion. However, I feel the time has come for district courts to adopt local rules requiring the government to record grand jury testimony of law enforcement personnel. Although there may be no constitutional or statutory requirement that grand jury testimony be recorded, nonetheless this court has cautioned that the better practice is to record and transcribe the minutes of all proceedings of the grand jury which are accusatorial in nature. See United States v. Arradondo, 483 F.2d 980 (8th Cir. 1973), cert.denied, 415 U.S. 924 (1974). As Judge Bright there stated:

> We note that failure of prosecutors to record significant testimony before the grand jury serves to thwart the right of the defendant under [a] showing of "particularized need" . . . to obtain grand jury testimony of a trial witness.
>
> 483 F.2d at 985 n.4.

Since we have not previously made it a court rule to record grand jury testimony, I do not vote for reversal here. However, I think that the time for that rule has arrived.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES OF AMERICA

Plaintiff

vs.

LEONARD CROW DOG,

Defendant

No. CR 75-18

United States District Court,
N.D. Iowa,
Cedar Rapids Division.
Aug. 4, 1975

ORDER

McMANUS, Chief Judge.

This matter is before the court on defendants' two resisted motions to dismiss, one for denial of the right to speedy prosecution and trial, and the other for discriminatory prosecution and government misconduct, both filed April 16, 1975. Also before the court are defendants' resisted post-trial motion in the alternative for judgment of acquittal or new trial filed June 27, 1975, and their resisted motion for post-

trial relief filed July 25, 1975.[1]

Defendants in each of these actions have been charged with committing criminal acts during the "Wounded Knee Takeover," an incident occurring on the Pine Ridge Indian Reservation, South Dakota, between February 27 and May 8, 1973. The procedural history of these cases has been summarized by this court in its prior ruling of May 2, 1975, granting a change of venue, and that discussion is incorporated by reference herein.

Counts I and II[2] in each of the three indictments were consolidated for

---

1
The motion for post-trial relief filed July 25, 1975, asks the court to amend and supplement the previously filed motion for new trial and to supplement the record on government misconduct. These two forms of relief are granted, and the court has considered the matters raised by the motion and supporting documents in ruling on the motions for new trial and to dismiss for government misconduct. A third request, for an evidentiary hearing on the issues raised by the recent motion, is denied.

2
Counts I and II in each indictment allege identical substantive offenses. Count I contains the charge of wilfully impeding a postal inspector while in the performance of his duties, in violation of 18 U.S.C. §§111 and 1114 (1970). Count II charges defendants with robbing another of personal property belonging to the United States, in violation of 18 U.S.C. §§2112 (1970).

trial pursuant to Rule 13, FRCrP, by order of May 12, 1975. Following a jury trial, a verdict of guilty on both counts was returned against all three defendants. Separate third counts against defendant Crow Dog in No. CR 75-18 and against defendant Camp in No. CR 75-20 were dismissed upon motion by the government subsequent to the jury's verdict.

Oral testimony and documentary evidence, including numerous in camera exhibits, were presented at a three-day hearing on defendants' pre-trial motions. Affidavits ordered by the court to be submitted by the government have also been filed in connection with these motions.[3] All motions are ripe for deci-

---

3
In reaching its decision on the motion to dismiss for discriminatory prosecution and government misconduct, the court has reviewed and considered the briefs, affidavits, transcripts, and all other documents and testimony presented in support thereof, including the following:
(a) those portions of the transcript in the trial of United States v. Banks & Means before the Honorable Fred Nichol in St. Paul cited by the defendants;
(b) the briefs and documents filed, together with the transcript of testimony adduced, at hearings on defendants' motions to dismiss for discriminatory prosecution and government misconduct in the Banks & Means case;
(c) appellant's and appellee's briefs submitted to the Eighth Circuit on the appeal of the decision in United States v. Banks & Means, 383 F.Supp. 389

sion and are considered sequentially below.

Motion to Dismiss for Discriminatory Prosecution

Defendants move this court to dismiss the indictments against them on the grounds that prosecution of these charges has been instituted and continued in bad faith and on a constitutionally impermissible basis, and that the government has com-

---

3 cont.
(D.S.D.1974), as well as the decision of the appellate court, 513 F.2d 1329 (1975);
(d) affidavits filed in this case by both parties in support of their respective motions and resistances thereto, and in particular the affidavits filed by the government in response to the directives of the court;
(e) the record in the instant case, including trial conduct and testimony;
(f) the motion for post-trial relief filed July 25, 1975, together with supporting documents;
(g) the memorandum opinion of the Honorable Andrew Bogue dated March 22, 1975, in the case of United States v. Escamilla, CR 73-5138 (D.S.D.);
(h) the memorandum opinion of the Honorable Warren Urbom dated June 19, 1975, in the cases of United States v. Cooper, United States v. Fleury, et al., and United States v. Alvarado, (D.Neb.), 397 F.Supp. 277.

mitted gross misconduct during the course of said prosecution. The motion relied upon defendants' rights under the Fifth, Sixth, and Ninth Amendments to the United States Constitution, the Federal Rules of Criminal Procedure, and the inherent discretionary powers of the district courts.

Discriminatory enforcement and application of a valid statute by state officials constitutes a denial of equal protection under the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). While Yick Wo specifically involved unequal administration of a public ordinance by a city licensing board, the underlying principle has been held applicable to the actions of prosecutors and police officials. Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 588, ul S.Ct. 1135, 6 L.Ed.2d. 551 (1961); United States v. Falk, 479 F.2d 616, 618 (7th Cir. 1973); Shock v. Tester, 405 F.2d 852, 855-56 (8th Cir. 1969).

The Fourteenth Amendment's prohibition against a state taking action which would "deny to any person within its jurisdiction the equal protection of the laws" restricts conduct of the federal government as well through the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); Mow Sun Wong v. Hampton, 500 F.2d 1031, 1037-38 (9th Cir. 1974); Washington v. United States, 130 U.S. App.D.C. 374, 401 F.2d 915, 922 (1968).

Mere conscious exercise of some selectivity in prosecution is not a constitutional violation. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). The defense of discriminatory enforcement requires a showing of intentional and purposeful selection based on an unjustifiable standard such as race or religion. Tollett v. Laman, 497 F.2d 1231, 1233 (8th Cir. 1974); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972). See Snowden v. Hughes, 321 U.S. 1,8,64 S.Ct. 397, 88 L.Ed. 497 (1944). The exercise of protected First Amendment activities is included among those bases upon which discrimination is constitutionally impermissible. Falk, supra at 620; Steele, supra at 1151; United States v. Crowthers, 456 F.2d 1074, 1080 (4th Cir. 1972).

Defendants contend that the instant prosecutions are part of an effort by the government to selectively enforce the laws against those Indians who are members or sympathizers of the American Indian Movement (AIM). They further argue that the misconduct of the government associated with these prosecutions evinces bad faith on the part of the government, that is, a motive to harass and intimidate rather than an honest attempt to bring criminals to justice. The bad faith, it is urged, indicates that the selectiveness in prosecution was purposeful and intentional, with the goal of suppressing the First Amendment rights of Indians to associate freely with AIM and to adopt the views espoused by that organization.

Freedom of association is protected by the First Amendment, e.g., Williams v.

Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.24 (1968), and criminal prosecutions selectively instituted purposefully to quash the exercise of that freedom would constitute a denial of equal protection. See Steele, supra at 1151; Crowthers, supra at 1080. But the court is unable to conclude that the criminal cases pending here against the defendants were brought purposefully and intentionally on the basis that the defendants were affiliated with AIM.

Defendants have presented three lines of evidence to support their theory of discriminatory prosecution. First, defendants cite statistical records maintained and published by the Justice Department which indicate an extremely low conviction rate in criminal cases arising from Wounded Knee in comparison with the average conviction rate for all criminal cases instituted by the Justice Department. There was testimony that the factual basis for many of the criminal charges brought against participants in Wounded Knee was weaker than in most criminal cases pursued by the Justice Department.

But these bald statistical correlations do not imply that their causation was a desire to discriminatorily prosecute AIM supporters. They do indicate a low conviction rate for the government, but the reason for this could be logistical difficulties in prosecuting criminal charges arising from a massive civil disorder, or a host of other factors. These figures do not compel an inference that the government has been using the criminal process to selectively harass and intimidate members of AIM.

Defendants allege and have presented testimony by individual AIM members to the effect that non-AIM members have not been prosecuted for violent criminal conduct, often directed at AIM sympathizers, whereas charges have been brought against AIM members for similar or less severe criminal acts. Approximately twenty specific instances of such forceful crimes as murder and shooting through an AIM member's house were related to the court, with allegations that no meaningful investigation into these incidents was conducted by the Federal Bureau of Investigation (FBI), and that no arrests were made or indictments sought even when incriminating evidence was present.

Upon the presentation of this testimony, the court directed the FBI to deliver its investigatory files regarding each of these occurrences to the court for an in camera examination. The files having been produced and thoroughly reviewed by the court, it is the opinion of this court that the allegations of the defendants are unfounded. The files do not reveal a lack of investigatory effort on the part of the FBI towards non-AIM members, nor do they indicate a failure to prosecute once meaningful evidence had been discovered.

The frequency of violence on the Pine Ridge Indian Reservation, during the Wounded Knee affair and subsequent to it, is deplorable. But the evidence simply does not show that the efforts of the government to limit criminal conduct and to bring the perpetrators of it to justice have been discriminatorily directed at the AIM faction.

Finally, defendants call attention to an incident which occurred at an unauthorized roadblock being maintained by one Richard Wilson and other supporters of the tribal council. Testimony adduced at the hearing on this motion as well as evidence produced in United States v. Banks & Means, consolidated Nos. CR 73-5034, CR 73-5035, CR 73-5062 and CR 73-5063 (D.S.D.1974), established that an automobile was forcibly stopped at this roadblock and a rifle pointed at one of the occupants of the car, Kent Frizzel, Solicitor General of the Department of the Interior. Defendants argue that the failure to prosecute any of those present at the roadblock for this assault, or for maintaining the roadblock as an interference with the passage of vehicles containing food and medical supplies, the passage of such vehicles having been directed by court order of the Honorable Andrew Bogue, indicates a policy of selective nonenforcement against Wilson and his followers.

This court is inclined to agree with the opinion of Judge Nichol in United States v. Banks, 368 F.Supp. 1245 (D.S.D.1973), when presented with the argument of selective prosecution based on the government's inaction towards this roadblock or its instigators. The fact that indictments have not been brought against any of those involved in this incident, considered in the context of a disorder where literally hundreds of infractions were being committed, does not by itself raise a serious doubt as to the motives of the prosecutor. 368 F.Supp. at 1252.

Three cases cited with strong reliance by the defendants are inapposite here. In United States v. Falk, supra, the appellate court vacated a conviction on a charge of failure to possess a draft card and remanded to the trial court with directions to hold a hearing on the issue of discriminatory prosecution. The court held that the published government policy of not prosecuting violators of the card possession regulations together with other factors established a prima facie case of improper discrimination in enforcing the law, which it was the government's burden to rebut at the hearing. 479 F.2d at 623.

Though a hearing was held in this case, it was not premised on the ground that defendants had already shown by their filings a prima facie case of selective prosecution, but rather the hearing was intended to develop the facts. The facts brought forth through the testimony and documentary evidence do not establish a reasonable doubt concerning the prosecutors' motives in the instant cases, especially compared to the strong inference of discriminatory purpose made out in Falk.

Similarly, the factual patterns in these cases do not rise to the level of discriminatory law enforcement brought forth in Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971) and Medrano v. Alee, 347 F.Supp. 605 (S.D.Tex. 1972). These cases involved civil rights actions to enjoin state prosecutions. Assuming that the factors delimited by the courts in those cases would also warrant dismissal of federal criminal

indictments, the court is of the opinion that the facts shown here do not show the clear racially discriminatory prosecution in Duncan or the bad faith harassment through various law enforcement techniques to destroy the freedom of association in Medrano. See United States v. Banks, supra, 368F.Supp. at 1252-53.

In summary, the court concludes that defendants' three categories of evidence, neither individually nor cumulated, show an intentional selection of these defendants for prosecution based on their affiliation with and activities in the American Indian Movement.

Defendants' motion raises a second theory for dismissal, a concept of such widespread government misconduct in the course of a criminal proceeding as to render the proceeding unconscionable under the due process clause because of irretrievable prejudice to a defendant's right to a fair trial. United States v. Banks, 374 F.Supp. 321, 333 (D.S.D. 1974). Government misconduct which has not incurably prejudiced the possibility of a fair trial so as to result in a denial of due process may nonetheless be grounds for dismissal under the court's inherent supervisory powers over the administration of criminal justice. United States v. Banks, 383 F.Supp. 389, 392-393 (D.S.D.1974), appeal dismissed, 513 F.2d 1329 (8th Cir. 1975). See McNabb v. United States, 318 U.S. 332, 340, 63 S.Ct. 608, 87 L.Ed. 819 (1942); Smith v. Katzenbach, 122 U.S. App.D.C. 113, 351 F.2d 810, 816 (1965).

Twelve particular instances of misconduct are alleged by defendants, supplemented by a general allegation of other unenumerated occurrences of government misconduct. The majority of these allegations concern activities which took place during the trial of Banks and Means or other Wounded Knee defendants.

Unless these particular deeds are viewed as so grossly prejudicial that they taint all prosecutions arising from Wounded Knee, or at least all of the "leadership cases," a position which this court does not accept, then these actions are not relevant to dismissal of the present cases unless repeated here. The court has not found the type of conduct alleged, such as failure to comply with court orders or presentation of perjured testimony, to have reoccurred here.

Insofar as the prosecutorial conduct in Banks & Means was prejudicial to the rights of the defendants in that case, they received a remedy through the dismissal of all charges against them. Banks, supra, 383 F.Supp. at 397. The strained construction placed by the government upon an order of court issued by Judge Nichol directing disclosure of information pertaining to FBI informants, including "evidence arguably relevant to invasion of or contact with the defense attorney's camp," is a possible contempt matter to be dealt with by Judge Nichol in that fashion should he so desire.

With respect to the issue of government informants' involvement in

the instant cases, the court is of the opinion that neither considered separately as a denial of the Sixth Amendment right to the assistance of counsel, nor as one element in a cumulative series of acts of misconduct, should a dismissal be ordered here.

Pursuant to this court's order, the FBI informant files of John Schafer and Douglas Durham, whose disclosure in March of this year of a close association with Dennis Banks during the latter's criminal trial in St. Paul precipated the dispute regarding compliance with Judge Nichol's order referred to above, were filed as in camera exhibits in this action. The court further ordered the government attorneys to review all informant files related to Wounded Knee and prosecutions arising therefrom, and to file with the court an affidavit stating inter alia that no information secured by any informants concerning defense strategy pertaining to any charges brought against these defendants was passed on to the investigative agency or prosecuting attorneys.

The court has meticulously examined the FBI files covering the activities and reports of Durham and Schafer and has found no evidence therein that either of these informants acted as an agent provocateur during the Wounded Knee takeover. These records likewise indicate that no defense strategy related to charges against the instant defendants and obtained through proximity to defense attorneys was passed on by these two informants to the FBI or the government prosecutors.

The government has submitted the affidavits directed by the court. Based on the court's in camera examination and the attestations contained in the affidavits signed by the government attorneys, the court is satisfied that any information concerning charges pending against these defendants, even if overheard by an informant from conversations of a defense attorney intended to be confidential, was not communicated to the FBI or government attorneys.

Mere presence of an informant during strategy sessions of defense attorneys is not per se violative of the right to freely communicate with counsel guaranteed by the Sixth Amendment. Hoffa v. United States, 385 U.S. 293, 306-308, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); United States v. Rosner, 485 F.2d 1213, 1224 (2nd Cir. 1973). See United States v. Zarzour, 432 F.2d 1, 3-4 (5th Cir. 1970). Since defense strategy was not passed on to the FBI or prosecuting attorneys, and absent the gross intrusion into the attorney-client relationship present in Coplon v. United States, 89 U.S.App.D.C. 103, 191 F.2d 749 (1951) or Caldwell v. United States, 92 U.S.App.D.C. 355, 205 F.2d 879 (1953), the court concludes that no Sixth Amendment violation occurred here. Hoffa, supra, 385 U.S. at 306-307, 87 S.Ct. 408.

Another item of misconduct specified in defendants' motion is massive prejudicial pre-trial publicity caused by the government. This argument is not well taken. The court is not aware

of nor has any evidence been produced showing massive prejudicial publicity in the Northern District of Iowa area prior to trial. Venue in these cases was transferred to this district upon defendants' motion for change of venue in order to avoid the effects of deep-seated prejudices or previous adverse media coverage which were arguably present in the District of South Dakota. National news broadcasts of the Wounded Knee affair some two years ago are not likely to have infused the populace in this district with such prejudice that they would be unable to render a verdict based on the evidence presented in court. See Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed. 2d 539 (1975); Irvin v. Dowd, 366 U.S. 717, 722-23, 31 S.Ct. 1639, 6 L.Ed.2d 751(1961).

The remaining items of alleged misconduct enumerated in defendants' motion are either of limited relevancy to the present cases as discussed above, or are clearly without merit from the record and require no further comment. It is the view of the court that the government has not engaged in misconduct related to these cases which would irreparably prejudice defendants' rights to a fair trial, and dismissal is not warranted either under the Fifth Amendment or the court's supervisory powers.

Motion to Dismiss for Denial of Speedy Trial

The substance of defendants' motions relating to speedy prosecution is

that the failure to try them together with Russell Means and Dennis Banks in January of 1974 has violated their rights under the Fifth and Sixth Amendments to the United States Constitution and FRCrP 48, and that these charges should accordingly be dismissed.

Sixth Amendment

In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) the Supreme Court delineated the criteria by which claims of deprivation of a speedy trial are to be judged. This case establishes a balancing test, in which the conduct of both the prosecution and defendant are weighed, and identifies four factors which are of prime importance: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. None of these factors are dispositive in and of themselves but rather are related factors and must be considered together with such other circumstances as may be relevant to the particular case. See, e.g., United States v. Baumgarten, 517 F.2d 1020 (8th Cir. 1975); United States v. Geller, 481 F.2d 275 (9th Cir. 1973); United States v. Lasker, 481 F.2d 229, 237 (2nd Cir. 1973); United States v. Phillips, 482 F.2d 191 (8th Cir. 1973); United States v. Toy, 157 U.S. App.D.C. 152, 482 F.2d 741 (1973). It has been observed, however, that when dealing with the Sixth Amendment, delay would almost always be considered harmless error unless there has been a showing of prejudice. United States v. Clay, 481 F.2d 133 (7th Cir. 1973).

(Next Page 59a)

"There is no text on this page."

Turning to an examination of the factors as they relate to these cases, it is the court's view that the delay must be measured from the date of the original indictments, or approximately 25 months. In United States v. Marion, 404 U.S. 307 at 321, 92 S.Ct. 455 at 463, 30 L.Ed.2d 468 (1971) the court made clear that the protections of the Sixth Amendment were triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." Here defendants have been continuously under restraints as a result of charges which arise out of the same incident. While the second indictment is much narrower than the original, the charges are of such a nature that they must be considered together for speedy trial purposes.

This delay then must serve as a "triggering mechanism" prompting consideration of the other balancing factors. Barker v. Wingo, supra, 407 U.S. 530-31, 92 S.Ct.2182. Here, however, a consideration of the other factors leads this court to the conclusion that defendants were not deprived of the right to a speedy trial.

Initially, the court would observe that the initial case was quite complex, which, under Barker, would justify some sort of delay. Indeed, in this case defendants appear to have raised no objection to the period from indictment until January of 1974 and desired the time for preparation of their own case and the urging of pre-trial motions. Likewise, the delay from January until

the termination of the Means-Banks trial was largely the result of defendants' unwillingness to participate in simultaneous trials.

Of more importance in consideration of this motion is the nature of defendants' demand and absence of clear request for a prompt trial. As the Supreme Court said in Barker v. Wingo, at 536, 92 S.Ct. at 2195:

> "But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial."

Here defendants' demand was not for a speedy trial but for a joint trial, and under the circumstances in these cases, it appears that this is precisely what they desired. The government was prepared to go ahead with simultaneous trial if that was defendants' desire, but they apparently did not.

Finally, defendants have made no showing of prejudice. For the most part defendants were free on bail, eliminating any substantial claim of prejudicial incarceration. Likewise, though given the opportunity, defendants have failed to show any impairment of their defense or anxiety or apprehension over the ultimate outcome of the case.

FRCrP 48

FRCrP 48 is a codification of the inherent power of a court to dismiss a

case for want of prosecution. 8A Moore's Federal Practice 48.03(1). It is not coextensive with the Sixth Amendment guarantee but rather implements that right. See, e.g., United States v. Clay, 481 F.2d 133, 135 (7th Cir. 1973); Hodges v. United States, 408 F.2d 543 (8th Cir. 1969); Cohen v. United States, 366 F.2d 363 (9th Cir. 1966); United States v. Mark II Electronics of Louisiana, Inc., 283 F.Supp. 280 (E.D. La.1968). Rule 48(b) gives the court discretion to dismiss an indictment where there has been unnecessary delay even though there has been no Sixth Amendment violation and under certain circumstances where no prejudice has been shown. See, e.g., United States v. Clay, supra; United States v. McKee, 332 F.Supp. 823 (D.Wyoming 1971); United States v. Navarre, 310 F.Supp. 521 (E.D.La.1969). While it appears that the rule imposes a more stringent standard upon the government than the Sixth Amendment, the precise limits and the standards for the exercise of this discretion are unclear. See United States v. Dallago, 311 F.Supp. 227 (E.D.N.Y.1970); United States v. Mark II Electronics of Louisiana, Inc., supra. The Eighth Circuit has indicated that the same factors which are relevant under the Sixth Amendment are likewise relevant under Rule 48(b). Hodges v. United States, supra.

Here, under the circumstances outlined above, the court is not inclined to dismiss the indictment on these grounds.

Due Process

Defendants' final claim in this regard is that the delay in the return of the present indictment has violated defendants' rights under the Fifth Amendment to the United States Constitution.

In United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), while recognizing that the statute of limitations provides the primary protection for delay in prosecution, the court did recognize that preindictment delay on the part of the government may violate defendant's rights under the Fifth Amendment. Since Marion, the Eighth Circuit has measured defendant's claims under the Fifth Amendment as involving a process of balancing the reasonableness of the delay against any resultant prejudice to the defendant. See e.g., United States v. Jackson, 504 F.2d 337 (8th Cir. 1974); United States v. Norton, 504 F.2d 342 (8th Cir. 1974); United States v. Washington, 504 F.2d 346 (8th Cir. 1974).

In applying this test, the court in Jackson indicated that while in some circumstances prejudice might be inferred from unjustified delay, generally where the government is not engaging in intentional delay in order to gain a tactical advantage over the accused, the defendant must affirmatively demonstrate prejudices. United States v. Jackson, supra, at 339 n.2.

Here, as above, defendants have made no showing to substantiate their

claims of prejudice or intentional delay. These claims are at best conclusory. By most standards, the delay is not substantial and there is no indication that an earlier indictment would have resulted in an earlier trial. Further, in light of the circumstances of this case and the magnitude of the prosecutions, the delay does not appear to be unreasonable.

Motion in the Alternative for Judgment of Acquittal or New Trial[4]

Following a jury verdict of guilty on both counts for all three defendants, the latter have moved under Rule 29, FRCrP, for a judgment of acquittal as to each defendant on the ground that the evidence is insufficient to sustain a conviction.

The standard to be applied in passing upon a motion for judgment of acquittal is whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact. Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229, 232-33 (1947), cert. denied, 331 U.S.837, 67 S.Ct. 1511, 91 L.Ed. 1850. See Conaway v. United States, 349 F.2d 907 (8th Cir. 1965), cert. denied, 382 U.S. 976, 86 S.Ct. 554, 15 L.Ed.2d 467. The evidence and inferences drawn therefrom must be viewed

---

[4] Request for oral argument on this motion is denied. Local Rule 16 (N.D.Ia.)

in the light most favorable to the government. United States v. Wolfenbarger, 426 F.2d 992, 994 (6th Cir. 1970); United States v. Fryer, 419 F.2d 1346, 1349 (8th Cir. 1969); Moore v. United States, 375 F.2d 877, 879-880 (8th Cir. 1967).

The defendants here were found guilty on a theory of aiding and abetting the commission of the crimes charged in the indictment. Specifically, they were convicted in Count I of wilfully and unlawfully impeding postal inspector Graham while the latter was engaged in the performance of his official duties, in violation of 18 U.S.C. §111,[5] and in Count II of unlawfully, wilfully and forcefully taking from the person of inspector Hanson a pistol belonging to the United

---

5 Section 111 of Title 18, United States Code, provides in part:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

States, in violation of 18 U.S.C. §2112.[6]

Federal statutory law provides that one who aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal. 18 U.S.C. §2. The United States Supreme Court has described the requisites of aiding and abetting in Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct.766, 769, 93 L.Ed.919 (1949):

> In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." L.Hand, J., in United States v. Peoni, 2 Cir., 100 F.2d 401, 402.

To find one guilty as an aider and abettor, it must be proven that he shared in the criminal intent of the principal and that there was a community of unlawful purpose at the time the act was committed. United States v. Untiedt. 493 F.2d 1056, 1058 (8th Cir. 1974); Snyder v. United States, 448 F.2d 716, 718

---

6 Section 2112 of Title 18, United States Code provides:

Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years.

(8th Cir. 1971); Johnson v. United States, 195 F.2d 673, 675-676 (8th Cir. 1952). The intent required has also been described as a "purposive attitude." United States v. Hill, 464 F.2d 1287, 1289 (8th Cir. 1972); United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971). Presence at the scene must be accompanied by a culpable purpose before it can be equated with aiding and abetting. Hill, supra at 1289; Kelton, supra at 671; Snyder, supra at 719.

The second essential element which must be shown is some active participation by the accused which furthers or encourages the crime. United States v. Irons, 475 F.2d 40, 42 (8th Cir. 1973); United States v. Thomas, 469 F.2d 145, 147 (8th Cir. 1972); Johnson, supra at 675. Mere presence even when coupled with negative acquiescence is not sufficient. Thomas, supra at 147; Baker v. United States, 395 F.2d 368, 371 (8th Cir. 1968); Johnson, supra at 675.

The evidence in the instant case consisted of testimony of three of the four postal inspectors allegedly impeded on March 11, 1973, together with a limited number of photographs and other exhibits. Viewing the evidence in a manner most favorable to government, it is the view of the court that the guilty verdict on Count I was not improper in light of the evidence.

All three defendants were placed by testimony at the museum in Wounded Knee during the period in which the postal inspectors were being held there

against their will. The crime of impeding and obstructing these postal inspectors was a continuing one, occurring over a period of a few hours. There was testimony that at various points during this time span all three defendants engaged in conduct which evidenced a "purposive attitude" towards the forceful interference with the postal inspectors.

Defendant Crow Dog proclaimed them prisoners of war, directed that they be searched, obtained briefcase keys from inspector Graham, and lectured them on the evils of the white man while they were bound. Defendants Camp and Holder acted as a guard and security officer, respectively, and both exerted custodial control over the inspectors in leading them to their point of release. Testimony as to such acts together with all the other evidence was sufficient to allow the inference that the actors maintained a purposeful attitude which facilitated the criminal venture of impeding and obstructing inspector Graham, and they were thus aiders and abettors. See United States v. Barlow, 152 U.S. App.D.C. 336, 470 F.2d 1245 (1970); United States v. Thomas, supra; United States v. Archer, 450 F.2d 1106 (8th Cir. 1971). Cf. United States v. Barber, 429 F.2d 1394 (3rd Cir. 1970).

The evidence also sustains the jury's verdict of guilty on Count II with respect to Defendants Crow Dog and Holder. The testimony regarding Crow Dog's involvement with the search of the inspectors and acquiring of keys from them plus the totality of the evidence was sufficient to permit an in-

ference of knowing participation which facilitated the removal and robbery of the pistol belonging to the government.

With respect to Defendant Holder, the question of sufficient evidence to sustain the verdict on Count II is a close one. But resolving the evidence and reasonable inferences therefrom in a manner most favorable to the government, the court is of the view that the evidence permits the inference that this defendant knowingly committed acts which encouraged or furthered the robbery of the pistol. The record contains testimony that one who called himself "Dan Holder," and who was identified as Defendant Stanley Holder by one inspector at trial, engaged in three types of acts which incriminate him as an aider and abettor. These acts were: (1) stating to the inspectors that property which had been taken from them would be returned upon their release, (2) repeated entrances into the museum while visibly armed with a sidearm, and on one such instance, revealing to the inspectors his authority as security officer and stating that he would keep them informed of their status, and (3) wearing a jacket which was part of the personal property which had been taken from the inspectors.

However, the court is unable to conclude that any evidence in the record sustains the inference that Defendant Camp knowingly associated himself with the crime of robbing inspector Hanson of a government-owned pistol. The record is devoid of any testimony that this defendant was present at the time the pistol was taken or that he

ever had knowledge that the pistol had been or was to be taken. Lack of proof that this defendant had knowledge of the crime and intended that it be committed, or of proof of such participation that knowledge and intent could be inferred, requires that he be acquitted on the charge of aiding and abetting the commission of the robbery alleged in Count II. See United States v. Barlow, supra; Snyder v. United States, supra; United States v. Smith, 418 F.2d 223 (6th Cir. 1969); Johnson v. United States, supra.

Defendants' contention that they must be acquitted on every count because the principals have not been identified or convicted is without merit. There is ample evidence in the record to establish that the crimes charged in the indictment were committed by one or more principals. It is not necessary that the principal be convicted or even identified if there is sufficient evidence to convict an accused of aiding and abetting the commission of the crime. United States v. Untiedt, 493 F.2d 1056, 1060 (8th Cir. 1974); Pigman v. United States, 407 F.2d 237, 239 (8th Cir. 1969); Hendrix v. United States, 327 F.2d 971, 975 (5th Cir. 1964).

Finally, defendants move for a new trial as to all counts on which a judgment of acquittal is not entered. The grounds urged on behalf of the motion are that a new trial is required in the interest of justice, that the verdict is contrary to the weight of the evidence, and that the court erred in its rulings on various motions, matters of

trial procedure, and admission of evidence. The granting or denial of a motion for new trial based on a review of the evidence is within the sound discretion of the trial court. United States v. Stewart, 445 F.2d 897, 899 (8th Cir. 1971).

Upon a review of the record in this case, it is the view of the court that there is substantial evidence to support the verdict on Count I as to all defendants and on Count II as to Defendants Crow Dog and Holder. It is also the court's opinion that the alleged errors in previous rulings are not well taken for the reasons heretofore given at the time of said rulings. Nor, in the view of the court, do the matters raised in defendants' motion for post-trial relief filed July 25, 1975 set forth a sufficient basis relevant to the cases at bar to warrant a new trial.

It is therefore

Ordered

1. Motions to dismiss denied.
2. Motion for judgment of acquittal granted as to Count II in CR 75-20, and Defendant Carter Camp is hereby acquitted of the charges contained in Count II. Motion denied as to all other counts.
3. Motion for new trial denied.
4. Motion for post-trial relief granted in part and denied in part as indicated in text.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 75-18

vs.

LEONARD CROW DOG,

Defendant.

ORDER

June 3, 1975

This matter is before the court on the Government's unresisted motion to amend this court's Order of May 30, 1975.

In one portion of this previous ruling the court, upon consideration of defendants' motion for disclosure of the names of government informers who had arguably been in contact with the "defense camp," directed the Government to produce the names and files of any

and all informants to the court in camera,[1] unless the prosecuting attorneys from U.S. v. Means & Banks provided the court with affidavits attesting to the following:

> (1) During the period from January 1, 1973, to May 31, 1975, the total number of Government informants utilized during the Wounded Knee affair and in connection with all prosecutions arising therefrom;
>
> (2) That no information secured by any of these informants concerning defense strategy relative to the present cases or previous cases involving the same defendants have been passed on to the investigative agency or the prosecutor.
>
> (3) That the informant files contain neither information indicating a role as agent provacateur by any informant, nor any other evidence arguably exculpatory towards the instant defendants.

The Government requests that the court's prior Order be amended by striking the aforementioned requirement. In support of its position the Government argues that it is not required to disclose the identity of any informant unless there has been an affirmative showing that the informant played an essential role in obtaining evidence to be utilized at trial. Here, the two prosecuting attorneys have sworn by affidavit that information obtained by an informant has neither been employed in the preparation of these cases nor will be utilized at trial.

The Government correctly asserts that the principal case cited by the court, Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639(1957), involved a fact situation where the informant was present during the commission of the crime, and evidence of the informant's activities with the accused was introduced at trial. 353 U.S. at 55-56. However, in limiting the privilege of nondisclosure of an informer's identity, the Court did not limit itself to the factual circumstances immediately before it, but rather enunciated a principle of balancing interests as follows:

---

1 By this phraseology, it was the intent of the court that the Government produce in camera only the names and files of those informants as to which the prosecuting attorneys could not attest to the requested statements. The Government is not required to divulge the names and files of all informants who operated during the Wounded Knee affair, for example, if exculpatory material appears in the file of one informant upon review thereof. Only the latter file need be produced and affidavits encompassing all other informants filed in order to comply with the court's ruling.

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.

. . .

"We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 60-62.

Again in Branzburg v. Hayes, 408 U.S. 665, 698, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Supreme Court noted that the purpose of facilitating communication of knowledge of criminal activity by preserving the communicator's anonymity is overcome by a critical need for identity of an informant in preparing a defense to a criminal charge.

In the instant case, the relevancy of informants to the defense is not limited to whether they provided evidence to be introduced at trial. The defendants' motion for dismissal of the indictments on grounds of selective and bad faith prosecution, which the court takes to be nonfrivolous, has placed in issue the propriety of conduct by the Government's prosecutorial and investigative staff during the Wounded Knee takeover itself and in connection with criminal cases arising therefrom.

In addition, the specific information directed by the court to be attested to in subparagraph (3) of the previous Order could suggest whether or not any particular informant was present at the time an alleged offense was committed, a factor traditionally considered of controlling importance in determining whether to disclose an informer's identity. Roviaro, supra; McLawhom v. State of North Carolina, 484 F.2d 1 (4th Cir. 1973); United States v. Barnett, 418 F.2d 309 (6th Cir. 1969).

In camera disclosure for an examination by the court is an appropriate step short of outright dissemination to the defendant in a situation where the balancing of interests regarding the secrecy of an informant is close. See United States v. Hurse, 453 F.2d 128 (8th Cir. 1971). And as has been stated many times during the hearing on the motion for dismissal, Judge Nichol ordered the United States Attorney's office in the case of United States v. Means & Banks to review FBI informant files for particular content, and

the files were thereupon made available for inspection by the government attorneys. Thus the court views the requirements posed in the alternative in its previous Order to be an appropriate method for the court to secure what it views as essential information concerning use of informants.

The affidavits filed in support of the instant motion by Mr. Hurd and Mr. Gienapp satisfactorily provide the information required under subparagraph (2) with respect to defense strategy having been passed on to the prosecutors. As to such information having been passed to the investigative agency, it shall be sufficient if the FBI Handling Agent for each informant provides an affidavit denying that any defense strategy was conveyed by the informant to the FBI. This affidavit shall be in lieu of the one otherwise to be provided by the prosecuting attorneys only with respect to subparagraph (2) , and the court's Order of May 30, 1975, is hereby amended to that effect. The aforesaid Order is also modified to extend the deadline for the filing of all affidavits until 9:00 a.m. June 9, 1975.

It is therefore

ORDERED

1. Motion denied.
2. This court's Order of May 30, 1975, is amended to the limited extent indicated in text.

June 3, 1975

[s]

Edward J. McManus, Chief Judge
NORTHERN DISTRICT OF IOWA
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONARD CROW DOG,

Defendant.

No. CR 75-18

ORDER

May 30, 1975

This matter is before the court on defendants' several resisted motions for discovery[1] and bill of particulars, all filed April 16, 1975. [2]

Motion for Bill of Particulars

Defendants seek a Bill of Particulars to provide certain details of the charges against them. The purposes of a Bill of Particulars are primarily to enable the defendant to prepare an adequate defense, to prevent any prejudicial surprise at trial, and to protect against a second prosecution for inadequately described offenses. Hickman v. United States, 406 F.2d 415 (5th Cir. 1969); Cook v. United States, 354 F.2d 529 (9th Cir. 1965); 1 Wright & Miller, Federal Practice and Procedure §129.

---

1 The specific motions for discovery considered in this order are: (1) the general discovery motion under Rule 16, FRCrP; (2) the motion for discovery of exculpatory evidence; (3) the motion for disclosure of all Government informers and operatives; and (4) the motion for disclosure of impeaching evidence.

2 By previous order of this court dated May 12, 1975, Counts I and II in each of the indictments were consolidated for trial on June 2, 1975, and Count III in CR 75-18 and CR 75-20 were severed from this trial. The motions are considered herein only as they relate to Counts I and II.

Upon reviewing the indictments and the narrative statement provided by the Government as part of the discovery in this case, it is the court's view that the defendants have been sufficiently apprised of the nature of the two charges against them so as to obviate the need for a Bill of Particulars.

Motion for Discovery of Exculpatory Evidence

Discovery is sought of "any and all evidence in [the Government's] possession, or which with due diligence may become known to them, favorable to the defendants and material to the issues presented. . . ." Defendants also ask the court to review in camera the entire Government files relating to these cases and to question the prosecuting attorney on the record for the purpose of establishing that all exculpatory material has been divulged.

The court has indicated in a previous motion its position with regard to discovery of transcripts of grand jury testimony. Information relating to character blemishes of Government witnesses is specifically dealt with below in the motion for discovery of impeaching evidence. As to other items of exculpatory evidence, it appears from the record that the Government has provided this information to the defendants. No authority has been cited to support the propriety of an in camera inspection of the complete Government files, and the court

finds in any case no showing of circumstances here which might warrant such an intrusion on equitable grounds.

Motion for Discovery of Impeaching Evidence

Defendants request disclosure of four categories of evidence which arguably relate to the credibility of Government witnesses, urging such disclosure under the principle of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The Government has agreed to provide the first three classes of materials, and the only dispute remaining concerns the fourth category, which asks for records of "prior misconduct or bad acts." Insofar as such evidence is incorporated in the personnel files of Postal Service employees who will testify, the court has ordered these files produced for in camera inspection to determine if they contain any such impeaching evidence. See United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973).

Specific instances of conduct which bear on truthfulness of a witness but do not result in a criminal conviction may be inquired into on cross-examination. Rule 608(b), Fed. Rules Evidence. If the reliability of a witness may be determinative of guilt or innocence, impeaching evidence regarding that witness is discoverable under the Brady rule. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). It is the view of the court that the Government should

therefore provide to defendants prior to trial any other information concerning misconduct of government witnesses and bearing on their credibility, which information is either in the possession of the prosecutor or the investigative agency. See United States v. Bryant, 439 F.2d 642, 648 n. 11(D.C. Cir. 1971).

Motion for Disclosure of All Government Informers and Operatives

Defendants move the court to require disclosure of the names of all persons who have been or are currently Government informers or operatives, and who arguably have had contact with the legal team of the defendants. The names of two FBI informants, Douglas Durham and John Schafer,[3] have surfaced independently of any judicial proceedings, and the defendants now seek the identity of others.

An informant who intrudes i to the strategy sessions of attorneys and their clients in a criminal case may violate the defendants' Sixth Amendment rights to counsel if information thereby secured is passed on to the prosecutors and utilized by them at the trial. Hoffa v. United States,

---

[3] The court has reviewed in camera the FBI informant files covering these two individuals, and has found no support therein for defendants' position that defense strategy was communicated to and utilized by the Government.

385 U.S. 293, 87 S.Ct. 408, 17 L. Ed.2d 374 (1966). But the mere presence of an informer at meetings between an attorney and client is not per se violative of the right to freely communicate with counsel as embodied in this amendment. Hoffa, supra at 306-308; United States v. Rosner, 485 F.2d 1213, 1224 (2nd Cir. 1973).

Both Assistant United States Attorneys for South Dakota prosecuting the instant cases have sworn by affidavit that no information obtained from any confidential informers has been utilized in preparing these cases for trial or will be utilized as evidence during the trial. However, it is the view of the court that further elaboration of these informants' roles is necessary to establish that their names are not discoverable for any purpose by the defendants. See Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); United States v. Hurse, 453 F.2d 128 (8th Cir. 1971). By not later than 9:00 a.m. Monday, June 2, 1975, the Government shall provide the names and files of any and all such informants to the court in camera unless the four Government attorneys[4] who received the Wounded Knee informant files in connection with United States v. Means - Banks forthwith provide the court with an affidavit attesting to the following:

---

[4] These four attorneys are William Clayton, David R. Gienapp, Richard D. Hurd, and Earl Kaplan.

(1) During the period from January 1, 1973 to May 31, 1975, the total number of Government informants utilized during the Wounded Knee affair and in connection with all prosecutions arising therefrom;

(2) That no information secured by any of these informants concerning defense strategy relating to the present cases or previous cases involving the same defendants ha been passed on to the investigative agency or the prosecutors;

(3) That the informant files contain neither information indicating a role as agent provocateur by any informant nor any other evidence arguably exculpatory towards the instant defendants.

Motion for Discovery and Inspection

The general discovery motion requests production of seventeen enumerated categories of material for inspection, copy or analysis by defendants. Upon review of the record, it is the court's opinion that either the defendants have been provided with all materials to which they are entitled under Crim. Proc. Rule 16, the Brady opinion, and the Jencks Act, or any deficiencies have been dealt with in the court's treatment of the particularized discovery motions. Of course, the Government should comply with the spirit

of Rule 16(g) and continue to provide any newly obtained material which would be discoverable under one of the above three principles.

Defendants' request for a protective order limiting disclosure of discoverable material appears largely moot, and no cogent reasons are given in support thereof. The request is therefore denied.

Motion for Daily Transcript in Forma Pauperis

Finally, defendants ask the court to authorize payment by the Government for a daily transcript of the proceedings in these cases. Since the trial of these matters involves only two relatively uncomplicated counts, the court finds that the expense to the Government entailed in providing daily transcript is unjustified in the present cases, and the request is denied.

It is therefore

ORDERED

1. Motion for Bill of Particulars denied.

2. The Government shall provide defendants prior to trial with impeaching evidence concerning trial witnesses as described in text.

3. The Government shall disclose the names and files of any and all informants as delimited in text to the court for in camera inspection by not later than 9:00 a.m. June 2, 1975,

unless the affidavits indicated in text are filed of record by not later than 9:00 a.m. June 2, 1975.

4. All other discovery motions denied.

5. Motion for daily transcript in forma pauperis denied.

May 30, 1975.

[s]

Edward J. McManus, Chief Judge
NORTHERN DISTRICT OF IOWA
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LEONARD CROW DOG, Defendant.	No.CR 75-18 **ORDER** May 12, 1975

This matter is before the court on defendants' resisted motions for production of grand jury minutes, to dismiss because of improper grand jury testimony and to dismiss for lack of subject matter jurisdiction, all filed on April 16, 1975. Also before the court is the Government's unresisted motion to consolidate these actions for trial filed April 16, 1975.

The procedural chronology of these cases has been described by this court in its earlier ruling of May 2, 1975, concerning a change of venue, and that discussion is incorporated by reference herein.[1]

---

[1] In that order and in ruling on the instant motions the court has reviewed relevant portions of the record in United States v. Banks, CR 73-5034 & CR 73-5062 and United States v. Means, CR 73-5035 & CR 73-5063.

Motions for Discovery of Grand Jury Minutes and to Dismiss Indictments

Defendants move the court for production of grand jury minutes and to dismiss the indictments[2] on the ground that only hearsay testimony was presented to the grand jury which returned these indictments.

The discovery motion requests production of "testimony of witnesses before the Grand Jury that returned the instant indictment, which witnesses the plaintiff intends to call . . . upon the trial. . . ." These statements would be made available in any case during the trial under the Jencks Act, as amended, 18 USC §3500. In light of this fact, and the arguments made by defendants in support of both the discovery motion and the motion to dismiss, it appears that defendants actually desire a broader and earlier discovery than granted by the Jencks Act.

Testimony adduced before a grand jury may be produced to a defendant by order of court under Rule 6(e), FRCrP, upon a showing of "particularized need." Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1965); Pittsburgh Plate Glass Co. v. United

---

[2] The indictments have been renumbered as follows: Leonard Crow Dog, CR 75-18; Stanley R. Holder, CR 75-19; Carter Camp, CR 75-20.

States, 360 U.S. 395, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959). As the language of the rule itself indicates, "a showing that grounds may exist for a motion to dismiss the indictment" constitutes a particularized need.

In the view of the court taken below, defendants have not established that grounds may exist to dismiss the indictment as a matter of law. No other showing of particularized need has been made which justifies a wholesale disclosure of the grand jury minutes. Pittsburgh Plate Glass, supra. Defendants' cited cases which eliminate the necessity of showing a particularized need, e.g., United States v. Amabile, 395 F.2d 47 (7th Cir. 1968); United States v. Youngblood, 379 F.2d 365 (2nd Cir. 1967), relate only to trial witnesses and the subject matter of their testimony, and such grand jury testimony is now classified as a statement obtainable under the Jencks Act. 18 USC §3500(e).

However, the court does favor the liberalized view towards the timing of discovery allowed by some courts with respect to grand jury minutes which would now be discoverable under the Jencks Act. See, e.g., Harris v. United States, 433 F.2d 1127 (D.C. Cir. 1970); United States v. Cullen, 305 F.Supp. 695 (E.D. Wis. 1969). The Government shall deliver to the defendants transcripts of all grand jury testimony of witnesses it intends to call at trial as soon as practicable, but not later than 48 hours prior to trial.

In urging that the indictments be dismissed, defendants argue that only hearsay testimony was presented to the grand jury though direct testimony was available. The United States Supreme Court has declared that an indictment based solely on hearsay testimony is constitutionally valid. Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 106 L.Ed. 397 (1956).

The 2nd Circuit has adopted a supervisory guideline directing courts in that circuit to consider dismissal of indictments where: (1) only hearsay testimony is used, (2) non-hearsay evidence is readily available, and (3) the grand jury is not informed of the nature of the evidence. United States v. Arcuri, 405 F.2d 691 (2nd Cir. 1968); United States v. Estepa, 471 F.2d 1132 (2nd Cir. 1972). But the rule in this circuit as well as the majority of other circuits is that an indictment returned on the sole basis of hearsay testimony is not invalid for that reason. United States v. Akin, 464 F.2d 7 (8th Cir. 1972), cert. denied, 409 U.S. 981, 93 S.Ct. 315, 34 L.Ed.2d 244 (1972); United States v. English, 501 F.2d 1254 (7th Cir. 1974); United States v. Cruz, 478 F.2d 408 (5th Cir. 1973); United States v. Addington, 471 F.2d 560 (10th Cir. 1973). Defendants' motion to dismiss is therefore denied.

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Defendants move for dismissal of certain of the charges against them on the ground that this court lacks

subject matter jurisdiction over these charges. Defendants direct their jurisdictional challenge to count 1 of their separate indictments charging them with impeding and intimidating a federal officer in the performance of his official duties in violation of 18 USC §111.

Defendant Carter Camp also asserts lack of jurisdiction as to count 3 of his indictment charging him with assaulting a federal officer with a dangerous weapon while said officer was performing his official duties. in violation of 18 USC §111. Defendant Leonard Crow Dog challenges jurisdiction as to count 3 in his indictment charging him with taking away personal property of another with intent to steal within the special territorial jursidiction of the United States, in violation of 18 USC §661.

The thrust of defendants' argument is that jurisdiction over any crimes allegedly commited by Indians within Indian country is reposed in the Oglala Sioux Tribal Court except as divested with regard to certain crimes by the Major Crimes Act, 18 USC §1153, in favor of the exclusive jurisdiction of the United States. They contend that 18 USC §§111, 661 state crimes which are not comprehended by §1153 and thus they can only be prosecuted for the activities alleged in the challenged counts in the Tribal Court.

It is the court's view that this argument is not correct. General federal criminal statutes, such as those

alleged here, apply to Indians while in Indian country and §1153 does not state an exhaustive list of those crimes which fall within federal jurisdiction if committed by Indians on a reservation. United States v. Consolidated Wounded Knee Cases, 389 F.Supp. 235 (D. Neb. and D.S.D. 1975). Stone v. United States, 506 F.2d 561 (CA8 1974). Head v. Hunter, 141 F.2d 449 (CA10 1944). The exceptions to the application of federal enclave laws to Indians on Indian reservations stated in 18 USC §1152 are not material here. This court has jurisdiction of the offenses against federal criminal statutes generally applicable throughout the United States to all persons present therein, which includes §§111, 661 as charged in the challenged counts.

Motion to Consolidate for Trial

The government moves for consolidation of the three indictments for trial and for severance of count 3 in the indictments against defendants Crow Dog and Camp. Defendants do not resist. This procedure appears proper in this matter under FRCrP 13, and therefore defendants' indictments are consolidated for trial and count 3 of CR 75-18 and count 3 of CR 75-20 are severed for purposes of trial.

It is therefore

ORDERED

1. Motions to dismiss denied.

2. Motion to produce grand jury minutes denied in part and granted in part as indicated in text.

3. Motion to consolidate the indictments for trial in cases Nos. CR 75-18, CR 75-19, and CR 75-20 granted.

4. Motion to sever count 3 of CR 75-18 and count 3 of CR 75-20 granted.

May 12, 1975.

[s]
Edward J. McManus, Chief Judge
NORTHERN DISTRICT OF IOWA
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 74-5100

vs.

LEONARD CROW DOG,

Defendant.

ORDER

May 2, 1975

This matter is before the court on defendants' resisted motion for determination of venue, or in the alternative, for transfer of venue, filed April 16, 1975.

These criminal prosecutions arise out of alleged unlawful activities by the three defendants during the "Wounded Knee Takeover," an incident occurring on the Pine Ridge Indian Reservation, South Dakota, between February 27, 1973 and May 8, 1973. The procedural history of these prosecutions is an essential ingredient to a comprehension of the issues posed by defendants' motions now pending in this court. A breif recitation of that procedural chronology follows.

On March 20, 1973, a federal grand jury in South Dakota returned identical nine-count indictments against defend-

ant Carter Camp and four other individuals--Clyde Bellecourt, Pedro Bissonette, Russell Means and Dennis Banks.[1] Charged in these indictments were eight substantive violations and one conspiracy offense.

Subsequently, additional indictments were returned against these five individuals on April 10, 1973, charging each of them with two more substantive counts.[2] At the same time, eleven-count indictments were returned against defendants Stanley Holder and Leonard Crow Dog,[3] each alleging verbatim the same offenses, except for naming the accused, as had been charged against the five aforementioned persons.

---

1 The indictments were returned as follows:

(1) Clyde Bellecourt, CR 73-5031;
(2) Pedro Bissonette, CR 73-5032;
(3) Carter Camp, CR 73-5033;
(4) Dennis Banks, CR 73-5034;
(5) Russell Means, CR 73-5035.

2 These supplemental indictments were numbered as follows:

(1) Dennis Banks, CR 73-5062;
(2) Russell Means, CR 73-5063;
(3) Clyde Bellecourt, CR 73-5064;
(4) Carter Camp, CR 73-5065;
(5) Pedro Bissonette, CR 73-5066.

3 The indictments returned against defendants Holder and Crow Dog were numbered CR 73-5067 and CR 73-5077, respectively.

The seven defendants in these previous actions moved the court to consolidate their cases for trial. The Honorable Fred J. Nichol, Chief Judge of the District of South Dakota, ordered a joint trial of the cases against Means and Banks, but denied the motion with respect to the other defendants.

Review of this denial was sought in the 8th Circuit Court of Appeals through a petition for writ of mandamus. The petition was denied by the appellate court on August 29, 1973. However, the court entered a separate order directing that all seven cases be under the direct supervision of Chief Judge Nichol, the cases previously having been partially the responsibility of another judge in the District, the Honorable Andrew W. Bogue.

Upon motion of the defendants and a showing of prejudice against the defendants in South Dakota, Judge Nichol, by order of October 29, 1973, transferred venue pursuant to Rule 21(a), FRCrP, to St. Paul, Minnesota, in the cases against Means, Banks, Bellecourt, Camp, Holder, and Crow Dog.

Joint trial of Means and Banks commenced on January 8, 1974. One count of the indictments was dismissed prior to trial, United States v. Banks, 368 F.Supp. 1245, 1248 (D.S.D. 1973), and judgment of acquittal was rendered by the court on five of the remaining substantive counts at the close of the Government's case. United States v. Banks, 383 F.Supp. 368 (D.S.D. 1974).

During jury deliberations on the remainder of the case, one juror became ill and unable to continue. Citing the Government's refusal to consent to an eleven-member jury as another event in a cumulative series of Government misconduct during the trial, the court orally dismissed the remaining counts of the indictment on September 13, 1974. This ruling was supplemented with a written decision, United States v. Banks, 383 F.Supp. 389 (D.S.D. 1974), from which an appeal was dismissed because the Double Jeopardy Clause prohibited review under the Criminal Appeals Act, 18 USC §3731 (1970). United States v. Banks, Nos. 74-1786 & 74-1787 (8th Cir., Apr. 16, 1975).

Meanwhile, on December 12, 1974, the three indictments involved in the instant cases were returned against defendants Holder, Camp, and Crow Dog by another grand jury in South Dakota.[4] All defendants are charged

---

4

The indictments were returned as follows:

(1) Stanley R. Holder, CR 74-5098;
(2) Carter Camp, CR 74-5099;
(3) Leonard Crow Dog, CR 74-5100.

in two identical counts,[5] and defendants Camp and Crow Dog are each charged with a separate third count.[6]

The original four indictments against these defendants were dismissed on February 5, 1975, upon the Government's request pursuant to Rule 41(a), FRCrP. Subsequently, Judge Nichol recused himself from the cases now pending, and they have been assigned to the undersigned judge.

5

Count I charges defendants with wilfully impeding a Postal Inspector while in the performance of his duties, in violation of 18 USC §§111 and 1114 (1970). Count II charges defendants with robbing another of personal property belonging to the United States within the Pine Ridge Indian Reservation, in violation of 18 USC §§1153 and 2112 (1970).

6

Count III in CR 74-5099 charges defendant Camp with assaulting an agent of the FBI with a deadly weapon while the agent was performing his official duties, in violation of 18 USC §§111 & 1114 (1940). Count III in CR 74-5100 charges defendant Crow Dog with wilfully taking with intent to steal personal property of another valued at more than $100 within the Pine Ridge Indian Reservation, in violation of 18 USC §§661 and 1153 (1970).

Determination of Venue

Defendants move the court to enter an order declaring venue to have been determined by the previous ruling of Judge Nichol to be in the District of Minnesota, Third Division, for the instant cases. Alternatively, the defendants ask for a transfer of venue under Rule 21(a), FRCrP, to the District of Minnesota. Defendants further request a hearing to present evidence in support of their motion.

The argument presented to bolster the defendants' first alternative request is that these proceedings, having been instituted by superseding indictments, are a continuation of the former prosecutions. Venue for trial of the charges alleged in the previous indictments had been set in the District of Minnesota. That ruling, it is urged, is the law of the case, should not be overturned by a coordinate judge, and furthermore should bar relitigation under the principle of collateral estoppel. It is the court's view that defendants' position on this aspect of their motion is not well taken.

In a federal criminal case, the Constitution of the United States imparts to the accused a right to a trial in the vicinage of the crime. Specifically, Art. III, Sec. 2 provides in part:

"The trial of all crimes . . . shall be held in the state where the said crime shall have been committed. . . ."

And the Sixth Amendment provides in part:

"In all criminal prosecutions the accused shall enjoy the rights to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. . . ."

However, concurrently with the right to a trial in the state and district where the offense was committed, the Sixth Amendment also guarantees the right to an impartial jury. Singer v. United States, 380 U.S. 24, 36, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). The right to a fair trial before an impartial tribunal is a fundamental ingredient of due process. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); United States v. McNally, 485 F.2d 398, 402 (8th Cir. 1973).

The due process right to a fair trial inures to the benefit of an accused in a federal trial through the Fifth Amendment, Jones v. Gasch, 404 F.2d 1231, 1234 (D.C. Cir. 1967); Vandegrift v. United States, 313 F.2d 93, 96 (9th Cir. 1963), and in a state trial through the Fourteenth Amendment. Estes v. Texas, 381 U.S. 532, 534-35, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Irvin v. Dowd, 366 U.S. 717, 721-22, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Pretrial publicity may so infuse prejudice into the populace from which a jury is to be drawn as to violate this right to a fair trial. Irvin v. Dowd, supra; Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963).

It is in the interplay between these two constitutional rights that Rule 21(a), FRCrP,[7] comes into prominence. The Rule provides a procedural device for the defendant to waive his right to a trial in the place where the crime was committed in order to maximally protect his right to a fair and impartial hearing. United States v. Marcello, 280 F.Supp. 510 (E.D. La. 1968), aff'd 423 F.2d 993 (5th Cir. 1970), cert. denied, 398 U.S. 959, 90 S.Ct. 2172, 26 L.Ed.2d 543 (1970).

A transfer for trial under Rule 21(a) can only be made upon motion by the defendant and a showing by him to the court's satisfaction that he cannot obtain a fair trial at any court point in the district. McNally, supra at 403; Marcello, supra at 513-14. The prejudice shown by the defendant must relate to

---

[7] Rule 21(a), Federal Rules of Criminal Procedure, provides:

"The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

the improbability of obtaining a fair hearing at the time of trial on the charges in the pending case. United States v. Partin, 320 F.Supp. 275, 279-80 (E.D. La. 1970). And the determination to transfer under this Rule cannot be made until an indictment or information stating the charges is on record. In re Investigation of World Arrangements, Etc., 107 F.Supp. 628, 630 (D.D.C. 1952); mandamus denied sub nom. In re Texas Co., 201 F.2d 177, cert. denied, 344 U.S. 904, 73 S.Ct. 283, 97 L.Ed. 698 (1952).

Here the defendants argue that the indictments currently of record are a mere continuation of the former proceedings because the charges are essentially the same as some charges contained in the previous indictments and further that the charges arise from the same set of factual events which led to the charges in the earlier indictments. It is argued that Counts I and II of the present indictments were included in paragraph 3 of Count IX, the conspiracy count, in the original indictments as part of an allegation relating the scope of the conspiracy. In the court's opinion, the substantive charges in the current indictments are not identical with or a mere continuation of the conspiracy count in the now-dismissed indictments.

Count III in defendant Camp's pending indictment is identical with Count III of the original indictment except that the name of the assaulted FBI agent has been changed. This too appears to the court as a substantial change in the offense charged. However, Count III of

Crow Dog's current indictment is substantially the same as Count I of the previous indictment, the only change being a one day difference in the date of the alleged offense. See Stewart v. United States, 395 F.2d 484, 487 (8th Cir. 1968).

Thus the question posed is whether an order changing venue in a federal criminal prosecution is conclusive as to the venue where the original indictment is dismissed after motion by the Government under Rule 48(a) but a superseding indictment charges some identical offenses plus other offenses arising from the same incident which precipitated the first indictment.

No case deciding this point has been cited by the parties, and the court has likewise found no clear precedent. Reported decisions from state courts have reached contrary results. Compare Ex parte Lancaster, 206 Ala. 60, 89 So. 721 (1921), and Johnston v. State, 118 Ga. 310, 45 S.E. 381 (1903), (previous ruling is determinative), with Gonzalis v. Lynch, 282 P.2d 255 (Okla. Crim. 1955), and State ex rel. English v. Normile, 108 Mo. 121, 18 S.W. 975 (1891), dismissal of prior case terminates jurisdiction in transferee court and venue must be determined anew in subsequent prosecution). These cases are not controlling here, of course, because they deal with interpretations of particular state venue statutes, and further differ in that the second prosecution had always been brought on charges identical to the first.

However, the reasoning of the Court in Gonzalis, supra, would seem applicable here. Dismissal of the indictment brought the initial prosecution to an end. The superseding indictment[8] begins an independent prosecution, especially where new charges are included, with venue in the state and district where the crime was committed

---

[8] The Government may obtain a second indictment charging identical or similar offenses and arising from the same events as a previous indictment either prior to or after dismissal of the earlier indictment under Rule 48(a), FRCrP. DeMarrias v. United States, 487 F.2d 19 (8th Cir. 1973), cert. denied, 415 U.S. 980, 94 S.Ct. 1570 (1974); United States v. Clay, 481 F.2d 133 (7th Cir. 1973), cert. denied, 414 U.S. 1009, 94 S.Ct. 371, 38 L.Ed.2d 133 (1973); United States v. Bowles, 183 F.Supp. 237 (D. Me. 1958). Of course, the statute of limitations may run if a lapse of time occurs between dismissal and reindictment, or if the indictments are at all contemporaneous, continuous custody may trigger delay infringing a defendant's Sixth Amendment right to a speedy trial. See United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

and not transferable prior to the return of the indictment. See World Arrangements, supra. Of course, defendant can again move for a transfer of venue under Rule 21, and the trial judge can take judicial notice of the evidence adduced in the previous ruling, giving it such weight as in his discretion it merits on the question of continuing prejudice.

Defendants' contentions that collateral estoppel and the deference given to prior rulings by judges of coordinate jurisdiction should prevent this court from determining that venue is not in the District of Minnesota are inapposite here. Collateral estoppel refers to litigation of the exact issue in a previous case. The issue of whether defendants can obtain a fair trial in South Dakota on the instant charges at the present time was not decided in the prior ruling. Similarly, since Judge Nichol's order did not reach the issue of venue on the cases now pending, it is not overruled by this decision.

Finally, defendants argue that by not declaring venue to be set in Minnesota, the effect is to allow the Government to transfer venue back to South Dakota. As the court has previously noted, this analysis fails because the instant proceedings are new cases in which the defendants' constitutional rights to a trial in the locality of the crime are attached at the outset.

Indeed the defendants' feared effect could well result if their

proposition were accepted by the court. In a proper case, the defendant might wish to have a subsequent indictment asserting different charges tried in the vicinity of the crime, as where new evidence caused dismissal of a prior indictment and may have also changed public reaction. But to hold that a transfer of venue ordered in the previous case was conclusive as to venue on any subsequent charges arising from the same facts would have the effect of allowing the Government to determine venue in the second case to the detriment of the defendant's constitutional right. A better resolution is to have venue placed in the vicinity of the crime at the instigation of the new charges, with defendant having the option once again to waive his right and seek a transfer under Rule 21.

Transfer of Venue

Defendants move alternatively to have these cases transferred for trial to the District of Minnesota pursuant to Rule 21(a), FRCrP. In support of this motion, defendants incorporate by reference the briefs and supporting documents submitted on the change of venue motion in the previous cases against Means, Banks and the defendants herein. An oral hearing is requested to present further evidence, but in light of the court's conclusions below, no further hearing is necessary.

To obtain a change of venue under Rule 21(a), the burden is upon the defendants to establish a reasonable likelihood that prejudice in the Dis-

trict of South Dakota will prevent a fair and impartial trial. United States v. Marcello, supra at 513-14; United States v. Kline, 205 F.Supp. 637, 639-40 (D. Minn. 1962). Ordinarily, the proper time for determining whether widespread prejudice prohibits selecting an impartial jury is during voir dire. United States v. McNally, supra at 403; Blumenfield v. United States, 284 F.2d 46, 51 (8th Cir. 1960), cert. denied, 365 U.S. 812, 81 S.Ct. 693, 5 L.Ed.2d 692 (1961); United States v. Kline, supra at 640.

However, when the probability of prejudice is great because of deeply-rooted passions or recent massive publicity, the efficacy of voir dire in screening the prospective jurors is diminished. Groppi v. Wisconsin, 400 U.S. 505, 510, 91 S.Ct. 490, 27 L.Ed. 2d 571 (1971); Irvin v. Dowd, supra at 727-28. In such a situation the court may become satisfied even prior to voir dire that the probability of a fair trial in the district is minimal. United States v. Marcello, supra at 514. See United States v. Rossiter, 25 F.R.D. 258 (D.Puerto Rico 1960).

Here the affidavits and other supporting materials filed in previous cases, particularly the survey data, indicate not only massive publicity surrounding the whole incident, but more significantly a deeply-felt prejudice toward Indians which was tremendously reinforced by the Wounded Knee affair. While the volume of inflammatory media coverage has subsided, and temporary feelings thereby allowed to ameliorate, the court is satisfied

upon reviewing the documentary evidence and the Government's resistance thereto that the long-term prejudices which were evident at the time of the prior change of venue are still present and create a reasonable likelihood of impairing the defendants' rights to a fair trial on the charges now outstanding against them in connection with the Wounded Knee takeover.

Having found the necessity for transfer, Rule 21(a) permits the court to transfer the cases to any other district "whether or not such district is specified in defendant's motion." The motion itself constitutes a waiver of the constitutional right to trial in the district where the crime was committed. United States v. Marcello, supra at 520; Rule 21, FRCrP, Advisory Committee Notes, Comment 3. The court may exercise its discretion and choose the district to which the cases are to be transferred. United States v. Anguilo, 497 F.2d 440, 441 (1st Cir. 1974); United States v. Marcello, supra at 520; 8 Moore's Federal Practice ¶21.01[1]. Accordingly, venue in these cases is transferred to the Northern District of Iowa, Cedar Rapids Division.

It is therefore

ORDERED

1. Motion in the alternative denied on determination of venue and granted in part on change of venue as indicated in text; the Clerk shall forthwith forward the files in these cases to the

Clerk of the United States District Court for the Northern District of Iowa.

2. Trial of these cases shall commence at 9:00 a.m. June 2, 1975, at the United States Courthouse, Cedar Rapids, Iowa.

May 2, 1975.

[s]

Edward J. McManus, Chief Judge
NORTHERN DISTRICT OF IOWA
Sitting by Designation

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

United States of America,

Plaintiff

vs.

Leonard Crow Dog,

Defendant

CR.74-5100

MEMORANDUM DECISION

March 12, 1975

The United States has moved this court to recuse itself from further proceedings in the above cases. The motion and its accompanying affidavits are filed pursuant to 28 U.S.C. 144. In light of the analysis presented below, recusal is appropriate and, therefore, the motion is granted.

18 U.S.C. 144 provides as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Because there is a presumption that a judge is unprejudiced and unbiased, a court must demand strict compliance with the statute before it will recuse itself. United States v. Anderson, 433 F.2d 856, 859 (8th Cir. 1970). The statute requires that the affidavits be timely, allege facts and reasons for affiants' belief rather than mere conclusions, and be accompanied by certificates of good faith. The affidavits before the court comply with these, the more mundane, requirements of the statute. The affidavits, however, also must be "sufficient."

The test to be utilized in determining whether an affidavit is "sufficient" is a matter of some dispute.[1] It is clear, however, that the nonconclusionary allegations in the affidavit must be accepted as being true for the purpose of ruling on the sufficiency of the affidavit. Berger v. United States, 255 U.S. 22, 32-33 (1921). The problem arises in deciding whether the affidavit must show bias in fact or whether a showing of appearance of bias is sufficient. This court has been unable to locate Eighth Circuit authority speaking directly to this issue. The court concedes that the Eighth Circuit appears to have applied the "bias in fact" standard in Pfizer, Inc. v. Lord,

---

[1] See, Note: Disqualification of a Federal District Judge for Bias--The Standard Under Section 144, 57 Minn.L.Rev. 749 (1973).

456 F.2d 532 (1972). There is no indication in that opinion, however, that the issue was squarely presented to the court. Furthermore, the court of appeals, in Pfizer referred to language in Berger, supra, that, in this court's view, supports adoption of the "appearance of bias" standard.[2] This court, therefore, does not feel bound to apply the "bias in fact" standard, but, rather, believes that it should choose a standard as a result of its own independent analysis.

The leading United States Supreme Court case on the sufficiency of such an affidavit lends support, in this court's view, to adoption of the "appearance of bias" standard. The Court in Berger said that the factual allegations in the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Berger, supra, at 33-34 (emphasis supplied). The Court gave no indication that the affidavit must show bias in fact; this court believes that all implications in Berger are to the contrary.

---

2 The court said at 456 F.2d 532, 537 that "(the challenged judge) may decide whether the affidavit meets the procedural requirements of the statute and whether the facts alleged give fair support to the charge of bias and prejudice." (emphasis supplied).

The Fifth Circuit Court of Appeals recently considered this issue and concluded that the affidavit need not show bias or prejudice in fact. Parrish v. Board of Commissioners of Alabama State Bar, 505 F.2d 12 (1974). It relied mainly on Berger in reaching that decision. This court finds the analysis contained in Parrish quite persuasive.

Furthermore, the statute itself speaks only to the belief of bias or prejudice. It does not appear to require that the affidavit show bias or prejudice in fact.

This court, therefore, takes the view that the sufficiency of the affidavit is to be determined through application of the following test: Can the nonconclusionary allegations, if accepted as being true, reasonably lead to the belief that affiants say exists in their minds?

This court would welcome the opportunity to dispute the truthfulness and relevance of the affidavits, and believes that it harbors no bias or prejudice against the United States or in favor of the defendants. The court, however, reluctantly believes that the affidavits accepted as true could lead a reasonable person to the belief that bias or prejudice is present.

The court is also aware of Canon 3(C) of the Code of Judicial Conduct which provides:"...A judge should disqalify himself in a proceeding in which his impartiality might reasonably

be questioned...."

The appearance of justice being of substantial importance, the court believes that it must grant the motion.

The motion is hereby granted. Movants will prepare the appropriate order.

Done and entered at Sioux Falls, South Dakota, this 12th Day of March, 1975.

BY THE COURT:

[s]
Chief Judge

UNITED STATES
CONSTITUTIONAL PROVISIONS

AMENDMENT I.

Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

UNITED STATES CODE
TITLE 18

§2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§111. Assaulting, resisting, or impeding certain officers or employees.

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

§1114. Protection of officers and employees of the United States.

Whoever kills any judge of the United States, any United States Attorney any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the secret service or of the Bureau of Narcotics and Dangerous Drugs [Drug Enforcement Administration], any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United

States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty,in the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title.

§1153. Offenses committed within Indian country.

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of

sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

§2112. Personal property of United States.

Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years.

§3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any por-

tion of such statement is witheld from the defendant and the defendant objects to such withholding,and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or

a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury.

(e) Secrecy of proceedings and disclosure. -- Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. [For purposes of this subdivision, "attorneys for the government" includes those enumerated in Rule 54 (c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.] Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The Court [The federal magistrate to whom an indictment is returned] may direct that an indictment [it] shall be kept secret until the defendant is in custody or has given bail [been released pending trial.] and in that event [Thereupon] the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

[Bracketed and underlined material added by Amendment of April 26, 1976.]